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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DON HORSLEY, Sheriff, *Cross-Petitioner*,

v.

JOSE NAPOLEAN SANTAMARIA, *Cross-Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO CROSS-PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE NAPOLEAN SANTAMARIA,
Petitioner-Appellee,

v.

DON HORSLEY, Sheriff,
Respondent-Appellant.

No. 95-16991

D.C. No. CV 95-00692 SBA

OPINION

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted
October 7, 1996--San Francisco, California
Submission Withdrawn October 22, 1996
Resubmitted February 5, 1997

Filed April 10, 1997

Before: J. Clifford Wallace, Joseph T. Sneed, and
Pamela Ann Rymer, Circuit Judges

Opinion by Judge Wallace;
Concurrence by Judge Sneed

SUMMARY

CRIMINAL LAW AND PROCEDURE/DOUBLE JEOPARDY

The court of appeals affirmed a judgment of the district court. The court held that a "not true" finding on a California sentence-enhancement allegation of personal use of a deadly weapon bars retrial of a murder charge on the theory that the defendant either used a deadly weapon or acted as an aider-abettor.

A California jury found appellee Jose Santamaria guilty of first-degree murder, but found "not true" a penalty-enhancement allegation that he had personally used a deadly weapon (knife) in committing the offense. The state court of appeal reversed Santamaria's conviction.

On remand, Santamaria moved to bar the prosecution's reliance on the theory that he personally used a knife during the killing. The trial court granted the motion, ruling that the collateral estoppel component of the Double Jeopardy Clause barred reprosecution of Santamaria based on the theory that he personally used the knife. The court dismissed the case when the prosecution was unable to proceed in light of the ruling on Santamaria's motion. The court of appeal affirmed.

The California Supreme Court reversed, holding that collateral estoppel did not apply because Santamaria's jury may have concluded beyond a reasonable doubt that he was guilty of murder either as a direct perpetrator or as an aider and abettor, without deciding which theory was correct. Santamaria sought federal habeas corpus relief.

The district court granted Santamaria's petition. The court ruled that under *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991) the Double Jeopardy Clause barred the prosecution from arguing on retrial that Santamaria used a knife to commit the murder. *Pettaway* held that a jury finding of "not true" on a California sentence-enhancement charge implicates the collateral estoppel component of the Double Jeopardy Clause, and that if the defendant's conviction is reversed, the "not true" finding bars the prosecution from relying on any theory of the offense factually inconsistent with it.

On appeal, appellant Don Horsley, the Sheriff of San Mateo County, contended that collateral estoppel did not apply. Horsley asserted that because under California law Santamaria's jury could have found that he was guilty either as a direct perpetrator or as an aider and abettor without determining which theory applied, its "not true" finding may have reflected a reasonable doubt only on the "direct perpetrator" theory.

[1] Santamaria's first jury may have found beyond a reasonable doubt that he was either a direct perpetrator or an aider and abettor, but harbored a reasonable doubt that he was a direct perpetrator. Collateral estoppel prevented the State from seeking the "deadly weapon" enhancement on retrial. [2] Fidelity to precedent required the court of appeals to reject the Sheriff's argument. The Sheriff's contention that *Pettaway* "overlooked" the "either/or" theory of murder under state

law was inaccurate. The view urged by the Sheriff was not "overlooked." The district court in *Pettaway* relied on it and the court of appeals discussed it in its opinion.

[3] *Pettaway* made clear that the court of appeals was aware of the complex state-law problem the Sheriff urged the court of appeals to consider. **[4]** Any error in *Pettaway*'s final holding was an error of federal law. State law was not the proper source for determining the meaning of the jury's verdicts and whether the issues were identical. The preclusive effect of a jury's verdict is a question of federal law. The argument of the Sheriff would have to be addressed to the court of appeals sitting en banc.

[5] The Sheriff argued that *Pettaway* has been substantially undermined by intervening decisions of the Supreme Court. **[6]** The cases were not closely on point with *Pettaway* and did not "undermine" that decision enough for a panel of the court of appeals to overrule it. The court's reliance on *Pettaway* in recent decisions, without indicating doubt as to its continuing vitality, strengthened this conclusion. **[7]** The court was bound by the collateral estoppel analysis of *Pettaway*. It was therefore not error for the district court to issue the writ of habeas corpus.

Concurring separately, Judge Sneed stated reasons supporting the view that *Pettaway* was wrongly decided.

COUNSEL

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Lawrence A. Gibbs, Grossman & Gibbs, Berkeley, California, for the petitioner-appellee.

Traci Huahn, Criminal Justice Legal Foundation, Sacramento, California, for the amicus curiae.

OPINION

WALLACE, Circuit Judge:

Sheriff Don Horsley of San Mateo County, California, appeals from the district court's order granting Jose Napolean Santamaria's petition for writ of habeas corpus. The district court had jurisdiction under 28 U.S.C. § 2254. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. §§ 1291 and 2253, and we affirm.

I

In February 1989, a jury found Santamaria guilty of murder and robbery, but found "not true" a sentence enhancement charge, under California Penal Code § 12022(b), that he personally used a deadly weapon in the commission of a felony. *See People v. Santamaria*, 8 Cal.4th 903, 909 (1994) (Santamaria). A state appellate court reversed the murder conviction, holding that an 11-day continuance during jury deliberations was prejudicial error. *Id.* at 909, *citing People v. Santamaria*, 229 Cal.App.3d 269 (1991).

On remand, Santamaria filed a motion to, among other things, "preclude prosecution's reliance on theory adjudicated in defendant's favor at first trial." *Id.* The trial court granted the motion, ruling that the collateral estoppel component of the Double Jeopardy Clause barred the prosecution "from retrying the defendant on the theory that he personally used the knife during the killing." *Id.* The prosecution subsequently stated that it was unable to proceed in light of the court's ruling, and the case was dismissed. The California Court of Appeal affirmed the trial court's dismissal of the case, but the California Supreme Court reversed. That court held "that collateral estoppel does not apply," *id.* at 922, and remanded the case to the trial court with instructions to reinstate the charges.

Santamaria then filed this petition for writ of habeas corpus in the United States District Court for the Northern District of California. The district court held that our decision in *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991) (*Pettaway*), *cert. denied*, 506 U.S. 904 (1992), compelled the conclusion that the Double Jeopardy Clause bars the prosecution from arguing at retrial that Santamaria used a knife to commit murder. Therefore, the district court issued the writ. The Sheriff, Santamaria, and the California Supreme Court all agree that this case is factually indistinguishable from *Pettaway*, and that the only substantial legal issue before us is the continuing vitality of that decision. *See Santamaria*, 8 Cal.4th at 923 ("*People v. Pettaway* . . . involved virtually the same issue and procedural posture as this case, except that there the weapon enhancement that the jury found not true was for use of a firearm, not a knife.").

II

We review de novo a district court's decision to grant or deny a writ of habeas corpus. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir.), *cert. denied*, 117 S.Ct. 588 (1996). The habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (amendments to 28 U.S.C. §§ 2241-2255) do not apply retroactively to this appeal. *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996).

The Sheriff urges us to revisit *Pettaway* for three reasons: (1) it was decided incorrectly as an original matter; (2) it rested upon an erroneous interpretation of California law since corrected by the California Supreme Court; and (3) it has been undermined by the Supreme Court's intervening decisions in *Caspari v. Bohlen*, 510 U.S. 383 (1994) (*Caspari*), and *United States v. Dixon*, 509 U.S. 688 (1993) (*Dixon*). We will address each of the Sheriff's contentions in turn.

A.

The Sheriff's first ground for urging us to overrule *Pettaway* cannot be accepted. It is settled law that one three-judge panel of this court cannot ordinarily reconsider or overrule the decision of a prior panel. *United States v. Gay*, 967 F.2d 322, 327 (9th Cir.) (*Gay*), *cert. denied*, 506 U.S. 929 (1992). This principle, that three-judge panels must respect binding circuit precedent, applies even if we believe that precedent to be erroneous. The Sheriff's various arguments that *Pettaway* misinterpreted *Ashe v. Swenson*, 397 U.S. 436 (1970), can be entertained only by this court sitting en banc.

B.

The Sheriff's second ground for questioning *Pettaway* is more compelling, because no panel of this court can have ultimate authority over a question of California law. Our colleagues on the California Supreme Court recently informed us that *Pettaway* "misunderstood the relevant state law," and urged us to reconsider that decision at the earliest opportunity. *Santamaria*, 8 Cal.4th at 923-26.

We held in *Pettaway* that a jury finding of "not true" on a California sentence-enhancement charge implicates the collateral estoppel component of the Double Jeopardy Clause, which the Supreme Court recognized in *Ashe*. *Pettaway*, 943 F.2d at 1047-48. If the defendant's conviction is subsequently reversed on appeal, that "not true" finding therefore bars the prosecution from relying at retrial on any theory of the offense factually inconsistent with it. In *Pettaway*, the jury found the defendant guilty of murder, but found "not true" two sentence enhancement charges that he had personally used a firearm and personally inflicted great bodily injury. The murder conviction was reversed on appeal, and at the retrial the prosecution proposed to introduce evidence tending to show that Pettaway personally shot the victim. We held that a retrial on that theory would be inconsistent with the first jury's "not true" findings, and would therefore violate the Double Jeopardy Clause. *Id.* at 1048.

The Sheriff and the California Supreme Court contend that *Pettaway* rested on the erroneous state-law assumption that the defendant could be convicted of murder only either (1) as a direct perpetrator, or (2) as an aider and abettor. California law apparently permits a third alternative.

> It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator.

Santamaria, 8 Cal.4th at 918 (citation omitted). Pettaway's first jury might, therefore, have concluded beyond a reasonable doubt that he was either an aider and abettor or the direct perpetrator, without definitely endorsing either theory. Its "not true" finding on the weapon enhancement charge might then simply reflect a reasonable doubt on the "direct perpetrator" theory.

Under this analysis, there would have been nothing inconsistent about retrying Pettaway under the "either/or" theory. "The first jury convicted the defendant of murder, finding that he was either the direct perpetrator or the aider and abettor. If the second jury does the same, the verdicts would be consistent, not inconsistent." *Id.* at 924. Evidence tending to show that Pettaway personally used a gun would also have been admissible at retrial to prove that he was "either a direct and active perpetrator or the aider and abettor," although it would not have been admissible to prove *solely* that he was the direct perpetrator. *See id.* at 932-33 (Mosk, J., concurring and dissenting).

[1] This case presents the same issue. Santamaria's first jury may have found beyond a reasonable doubt that he was either a direct perpetrator or an aider and abettor, but harbored a reasonable doubt that he was a direct perpetrator. Collateral estoppel obviously prevents the State from seeking the "deadly weapon" sentence

enhancement again at retrial. But, the Sheriff argues, a conviction at retrial under the "either/or" theory would not be logically inconsistent with the first jury's "not true" enhancement finding, even if evidence is presented which tends to suggest that Santamaria personally used a knife.

[2] We understand the Sheriff's argument, but fidelity to our precedent requires us to reject it. The Sheriff's contention that *Pettaway* "overlooked" the "either/or" theory of murder under state law is inaccurate. The view now urged by the Sheriff was not "overlooked"; the district court in *Pettaway* relied upon it to deny the writ, and we discussed it in our opinion. *Pettaway*, 943 F.2d at 1044. We held in *Pettaway* that this rationale "assumes that collateral estoppel does not apply unless the issue previously determined was necessary to the question of guilt or innocence." *Id.* We then explained at length why the jury's factual finding on the weapon enhancement charge was entitled to preclusive effect even though it "was not formally necessary for a finding of guilt on the murder charge." *Id.*

> The jury was instructed that it had the duty to determine whether the state had proven beyond a reasonable doubt that Pettaway fired the handgun. Thus, the issue of use was tried to the jury in a proceeding with all the "hallmarks of a trial on guilt or innocence," and was "necessarily determined" for the purpose of collateral estoppel.

Id. at 1045 (footnote omitted).

[3] That may be a less than satisfactory response, because the Sheriff had also argued that, even if the factual finding is preclusive, a subsequent conviction under the "either/or" theory could be consistent with it. Our

opinion in *Pettaway* does not contain a fully persuasive response to that point. The opinion does make it clear, however, that we were aware of the complex state law problem which the Sheriff now urges us to consider. *See id.* at 1044 (quoting the district court's description of the "either/or" theory).

[4] *Pettaway* may have given insufficient attention to this complex problem. Or, it may have rejected the technical, legalistic conception of "inconsistency" now urged by the Sheriff. Regardless, any error in *Pettaway's* final holding was an error of federal law. We do not agree that state law is "the proper source for determining the meaning of the jury's verdicts and whether the issues are identical." *Santamaria*, 8 Cal.4th at 917. The Supreme Court reaffirmed recently that "[t]he preclusive effect of the jury's verdict . . . is a question of federal law which we must review de novo." *Schiro v. Farley*, 510 U.S. 222, 232 (1994). *Pettaway* considered these arguments, and concluded as a matter of federal law that the use at retrial of evidence tending to show that Pettaway used a gun would "violate double jeopardy principles." *Pettaway*, 943 F.2d at 1048. Right or wrong, we are bound by that conclusion. The arguments of the Sheriff, and our concurring colleague, must be addressed to this court sitting en banc.

C.

[5] A three-judge panel can revisit prior Ninth Circuit precedent on a federal issue when "an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point." *Gay*, 967 F.2d at 327, *quoting United States v. Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985). The Sheriff argues that *Pettaway* has been substantially undermined by the

Supreme Court's intervening decisions in *Caspari* and *Dixon*.

Dixon dealt with when a successive prosecution is for the "same offense" as an earlier prosecution, and thus barred by the claim-preclusion aspect of the Double Jeopardy Clause. Under *Blockburger v. United States*, 284 U.S. 299 (1932), offenses were considered different for Double Jeopardy purposes as long as each "require[d] proof of an additional fact which the other d[id] not." *Id.* at 304. In *Grady v. Corbin*, 495 U.S. 508 (1990), the Supreme Court departed from *Blockburger* and held that offenses would also be considered the same "if, to establish an essential element of [the new offense], the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 510.

Pettaway recognized that "[t]he present case presents essentially the same situation" as *Grady*, and quoted extensively from that opinion. *Pettaway*, 943 F.2d at 1046-47. That is hardly surprising; by adopting a more fact-driven approach to the meaning of "same offense," *Grady* blurred the line between the former claim preclusion (*Blockburger*) and issue preclusion (*Ashe*) aspects of the Court's Double Jeopardy jurisprudence.

In *Dixon*, the Supreme Court overruled *Grady* and returned to the *Blockburger* test for claim preclusion. Nonetheless, the demise of *Grady* in the "same offense" context does not undermine *Pettaway*'s conclusions in the very different context of issue preclusion. *Dixon* recognized that *Ashe* may sometimes bar prosecutions when *Blockburger* would not. "The collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the

same facts." *Dixon*, 509 U.S. at 705 (citation omitted). The Court also pointed out that "[o]f course the collateral-estoppel issue is not raised in this case." *Id.* *Dixon* is not closely on point with *Pettaway*.

Caspari held only that an extension of *Bullington v. Missouri*, 451 U.S. 430 (1981) (*Bullington*), beyond the context of capital sentencing would be a "new rule" for purposes of *Teague v. Lane*, 489 U.S. 288 (1989). *Caspari*, 510 U.S. at 396-97. *Bullington*'s core holding was that when the death penalty phase of a capital trial bears "the hallmarks of the trial on guilt or innocence," the Double Jeopardy Clause bars retrial of that proceeding if the state fails to obtain a death sentence. *Bullington*, 451 U.S. at 439. *Pettaway* cited the "hallmarks" language above, as well as numerous other sources, in its discussion of whether the critical issue was "necessarily decided" in Pettaway's first trial. *Pettaway*, 943 F.2d at 1044. *Bullington*'s vitality in non-capital cases is not critical to *Pettaway*; in any event, *Caspari* did not decide that issue on the merits.

[6] The Supreme Court carefully limited the holdings of both *Dixon* and *Caspari*. *Dixon* did not decide any collateral estoppel issues, and *Caspari* held only that *Bullington* cannot be extended on collateral review because of the non-retroactivity principle of *Teague*. Neither of these cases are closely on point with *Pettaway*, and neither "undermine" that decision enough for this panel to overrule it. Our reliance on *Pettaway* in several recent decisions, without indicating any doubt as to its continuing vitality, strengthens this conclusion. *See United States v. McLaurin*, 57 F.3d 823, 826-27 (9th Cir. 1995); *United States v. Weems*, 49 F.2d 528, 531-32 (9th Cir. 1995).

[7] We conclude that we are bound by the collateral estoppel analysis of *Pettaway*. It was therefore not error for the district court to issue the writ of habeas corpus.

AFFIRMED.

SNEED, Circuit Judge, Concurring Separately:

I agree with the majority that this court's opinion in *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991), requires this panel to affirm the district court's grant of Santamaria's habeas corpus petition. I write separately to explain why I believe that *Pettaway* was wrongly decided, and why this court should rehear this case en banc to overrule *Pettaway*.

I.

SANTAMARIA'S TRIAL

To appreciate fully the issues involved, it is necessary to review the evidence presented to the jury that convicted Santamaria of murder.

> On September 5, 1985, the body of Victor Guadron was discovered in Moss Beach. Evidence indicated the body had been stabbed. . . . [Santamaria] was charged with Guardron's murder. . . . The main prosecution witness was Anthony Nubla, who had pleaded guilty to being an accessory to the murder and agreed to cooperate with the prosecution. Nubla testified that in the morning of September 5, at [Santamaria's] request, [Nubla] gave [Santamaria] and Guadron a ride. After running

> an errand, they drove to Dolores Park, where Nubla got out to buy marijuana. He heard someone yell "Help," turned around, and saw [Santamaria] hugging Guadron's neck and stabbing him.

People v. Santamaria, 8 Cal.4th 903, 908-09 (1994).

The jury convicted Santamaria of murder, but found not true a sentence enhancement charge that he personally used a knife during commission of the crime. *Id.* at 909. Santamaria never confessed to the crime, and Nubla was the only witness who testified that he saw Santamaria stab Guadron. *Id.* Apart from Nubla's testimony, the only other evidence linking Santamaria to Guadron's murder was some jewelry that had been stolen from Guadron and that Nubla and Santamaria together delivered to a pawn shop. *Id.*

In light of the above, the jury's dual findings--guilty of murder, but not true that Santamaria personally used a knife--initially appear inconsistent. However, there is no real inconsistency. Nubla, who plead guilty to being an accessory and cooperated with the prosecution, had a strong incentive to present his testimony in a fashion that pinned most of the blame on Santamaria, and downplayed his own culpability. Recognizing Nubla's mixed motives, the jury may well have harbored a reasonable doubt as to who actually stabbed Guadron--perhaps Nubla, not Santamaria, was the actual stabber.[1/] Such a reasonable

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1. The California Supreme Court put it this way:

> Defendant . . . argues that the jury did reach a unanimous verdict; it unanimously found the knife-use allegation not true. This is correct, but is of far less significance than defendant contends. It shows only that

doubt would explain the jury's not true finding on the personal knife use allegation.[2/]

At the same time, the jury quite consistently may have been persuaded, beyond a reasonable doubt, that Santamaria participated actively in the murder. Under California law, the prosecution can obtain a murder conviction by proving beyond a reasonable doubt either: (A) that the defendant was the direct perpetrator (the "direct perpetrator" theory); or (B) that the defendant was an aider and abettor (the "aider and abettor" theory); or (C) that the defendant was either a perpetrator or an

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> there was a reasonable doubt in the minds of the jurors that defendant specifically used a knife. It does not show the reverse, that the jury specifically found defendant was an aider and abettor. Indeed, under the facts of this case, such a finding is most unlikely. The jury may merely have believed, and most likely did believe, that defendant was guilty of murder as either a personal knife user or an aider and abettor but it may have been uncertain exactly which role defendant played. That, too, would fully explain, and necessitate, the split verdict.
>
> Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. Sometimes, as probably occurred here, the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other.

Santamaria, 8 Cal.4th at 919.

2. Under California Penal Code Section 12022, a defendant's sentence may be enhanced only if the jury finds *beyond a reasonable doubt* that the defendant personally used a weapon. *Santamaria*, 8 Cal.4th at 918.

aider and abettor (the "either/or" theory). *Id.* at 918-21.[3]

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3. The California Supreme Court stated the following:

> [T]he jury here may not have been able to decide beyond a reasonable doubt whether defendant or Nubla actually wielded the knife, but was convinced beyond a reasonable doubt that, either way, defendant was guilty of Guadron's murder. To go further and conclude that the jury specifically found defendant did not use the knife would not apply the collateral estoppel rule with "realism and rationality."
>
> This shows that the issue necessarily decided by the knife-use verdict and the issue sought to be precluded in the murder prosecution are not identical, but quite different. Although defendant claims he merely seeks to preclude the theory that he used the knife, he necessarily is claiming more; he seeks to preclude the theory, and evidence to support the theory, that he either used the knife or aided and abetted the one who did. This, however, is not the issue decided regarding the enhancement allegation. Whether defendant specifically used a knife is one question; we may assume the prosecution did not prove that beyond a reasonable doubt, which explains the not true enhancement verdict. Whether defendant committed murder by either using a knife or aiding and abetting the one who did is quite a different question; the prosecution did prove that to the jury's satisfaction.
>
> It is theoretically possible the jury concluded defendant was specifically the aider and abettor, despite the paucity of supporting evidence. But that is not the test. Setting the inquiry "in a practical frame" and viewing it "with an eye to all the circumstances of the proceedings," we conclude the jury did not "necessarily decide" that defendant was the aider and abettor, only that it had doubts as to his exact role. Defendant has the burden of showing that the issue he seeks to foreclose was actually decided by the jury. This he cannot do.

"As long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder . . . the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator." *Id.* at 918. Thus, if the jury was convinced that Nubla and Santamaria together murdered Guadron, but the jury harbored a reasonable doubt as to who actually stabbed Guardron, it would be entirely appropriate for the jury to decide, as it did: (1) that Santamaria was guilty of murder; and (2) that the prosecutor failed to prove the personal knife use allegation beyond a reasonable doubt.

II.

HOW THIS CASE SHOULD BE ANALYZED ABSENT PETTAWAY

I begin my analysis with *Ashe* v. *Swenson*. There the Supreme Court held that collateral estoppel is "a part of the Fifth Amendment's guarantee against double jeopardy." 397 U.S. 436, 442 (1970). The Court defined collateral estoppel as follows: "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. The party seeking to preclude relitigation of an issue bears the burden of proving "that the issue whose relitigation he seeks to foreclose was actually decided in his favor" in the first proceeding. *Schiro* v. *Farley*, 510 U.S. 222, 236 (1994) (quoting *Dowling* v. *United States*, 493 U.S. 342, 350 (1990)) (internal quotations omitted).

In the present case, the petitioner contends that there are two distinct issues that the prosecution is collaterally

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Santamaria, 8 Cal.4th at 920-21 (citations omitted).

estopped from litigating at retrial. First, the prosecution is precluded from arguing at retrial that Santamaria personally stabbed Guadron (the direct perpetrator theory). I agree. By rendering a not true finding on the sentence enhancement allegation, the jury at the initial trial "actually decided," *Schiro*, 510 U.S. at 236, that the prosecution failed to prove Santamaria's personal use of the knife *beyond a reasonable doubt.* "Having received one fair opportunity to offer whatever proof it could assemble, the State is not entitled to another." *Bullington* v. *Missouri*, 451 U.S. 430, 446 (1981) (citations omitted).

Second, petitioner also contends that the prosecution is collaterally estopped from litigating the either/or theory at retrial. I disagree. Although petitioner acknowledges that collateral estoppel does not bar the prosecution from attempting to prove at retrial that Santamaria was an aider and abettor,[4] he contends that the prosecution is barred from attempting to prove that Santamaria was either the direct perpetrator *or* the aider and abettor. To prevail on this claim, petitioner must prove that the jury at the initial trial "actually decided" the either/or theory in his favor. *Schiro*, 510 U.S. at 233-36. In other words, petitioner must prove: (a) that the prosecutor at the first trial presented the either/or theory to the jury; (b) the jury considered the theory; and (c) the jury expressly rejected the theory.

Petitioner cannot sustain this argument. The jury found Santamaria guilty of murder. Under California law, the guilty verdict means that the jury was persuaded

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4. The prosecution has stated that it is unable to proceed on an aider and abettor theory at retrial. To prove that Santamaria was an aider and abettor, the prosecution would have to prove that Nubla was the direct perpetrator, and the prosecution lacks evidence to support such a charge.

beyond a reasonable doubt that Santamaria was either: (a) the direct perpetrator, or (b) an aider and abettor, or (c) either the direct perpetrator or an aider and abettor. *See Santamaria*, 8 Cal.4th at 918-21. The jury cannot have relied on the direct perpetrator theory because that would be inconsistent with its not true finding on the personal knife use allegation. It follows that, to support its verdict, the jury must have relied either on the aider and abettor theory, or the either/or theory.

Petitioner, however, argues that the jury must have relied on the aider *and* abettor theory, and rejected the either/or theory, because that theory is inconsistent with the not true finding on the personal knife use charge. This argument is false. There is no inconsistency between the either/or theory and the not true finding. The jury could have harbored a reasonable doubt as to who actually stabbed Guadron, but been persuaded beyond a reasonable doubt that: (a) Nubla and Santamaria together murdered Guadron, and (b) either Nubla or Santamaria was the actual stabber. Indeed, the California Supreme Court concluded that this is the most plausible explanation for the jury's actions. Santamaria, 8 Cal.4th at 919.

Aside from arguing the alleged inconsistency between the not true finding and the either/or theory, petitioner has failed to demonstrate that the jury expressly rejected the either/or theory. Thus, petitioner has failed to bear his burden of proving that the either/or theory "has once been determined by a valid and final judgment" in his favor. *Ashe*, 397 U.S. at 443. Were it not for *Pettaway,* I would hold that the prosecution is not collaterally estopped from arguing the either/or theory at Santamaria's retrial.

III.

THE PETTAWAY CASE

My argument that *Pettaway* was wrongly decided commences with the California Supreme Court statement that this court's opinion "misunderstood the relevant state law." *Santamaria*, 8 Cal.4th at 923. Accordingly, the California Supreme Court urged this court to reconsider its decision. *Id.* at 925. I submit that the California Supreme Court was correct in its assessment of *Pettaway.*

In *Pettaway*, like *Santamaria*, the jury convicted the defendant of murder, but found "not true" a sentence enhancement charge that he personally used a deadly weapon (in his case a gun) to commit the murder. *Pettaway*, 943 F.2d at 1043. The California Court of Appeal in *Pettaway* reversed the murder conviction, due to a flaw in the jury instructions. *Id.* On remand, Pettaway argued that collateral estoppel precluded the prosecution from advancing a theory that he personally fired the murder weapon (the direct perpetrator theory). *Id.* The trial court agreed, but the California Court of Appeal reversed. *People* v. *Pettaway*, 254 Cal.Rptr. 436 (Cal.App.1 Dist. 1988). The California Supreme Court denied review. *Pettaway*, 943 F.2d at 1043. Pettaway then filed a petition for a writ of habeas corpus in federal district court. The district court denied Pettaway's petition, and we reversed. *Id.*

We stated our holding as follows:

> [W]e hold that it would violate double jeopardy principles if, on retrial of the second offense, the prosecution attempted to prove that Pettaway did personally use the gun. . . . Of course, the prosecution could still seek to prove Pettaway

> guilty of first degree murder under an aiding and abetting theory, but, as we have pointed out, the prosecutor expressly eschews any intention to do so.

Id. at 1048. In other words, we held that collateral estoppel bars retrial on a direct perpetrator theory, but does not bar retrial on an aider and abettor theory. Our holding, however, was silent as to whether collateral estoppel bars retrial on an either/or theory. Therefore, the *Pettaway* court erred by granting Pettaway's habeas petition without deciding whether the prosecution was collaterally estopped from arguing an either/or theory at retrial.

Judge Wallace, in describing the *Pettaway* opinion, states: (1) that the district court relied on the either/or theory in denying Pettaway's habeas petition; and (2) that in *Pettaway* there was discussion of the either/or theory. *See* op. at 4038 (citing *Pettaway*, 943 F.2d at 1044). Nonetheless, the *Pettaway* court reversed the district court's order, and remanded with instructions to issue the writ of habeas corpus. *Pettaway*, 943 F.2d at 1048. Therefore, it is possible to infer that the *Pettaway* court decided that the prosecution *was* collaterally estopped from arguing an either/or theory at retrial. Such an inference, however, is an incorrect application of collateral estoppel.

The district court in *Pettaway* stated its holding as follows: "[I]t is clear to the court that the sentence enhancement findings should not invoke collateral estoppel and prevent Petitioner from being retried on the theory that he personally shot Ms. Taylor." That is, the district court held that the prosecution was not collaterally estopped from arguing a *direct perpetrator theory* at retrial. That holding was erroneous. By reversing the district

court, this court held only that the prosecution was collaterally estopped from arguing a direct perpetrator theory at retrial. That holding was correct. However, *Pettaway* did not hold, and it would be erroneous for us to hold, that the prosecution is collaterally estopped from arguing an *either/or theory* at retrial.

Apart from the single paragraph in which *Pettaway* quoted the relevant language from the district court opinion, *id.* at 1044, its analysis reflects no proper recognition that the either/or theory constitutes a third possible ground for convicting a defendant of murder under California law. *Id.* at 1048. The entire analysis appears premised on an unstated assumption that there are only two possible theories (a direct perpetrator theory or an aider and abettor theory) that can support a murder conviction under California law. Thus, the California Supreme Court was correct when it stated that *Pettaway* "misunderstood the relevant state law." *Santamaria*, 8 Cal.4th at 923.

The *Pettaway* court's "misunderstanding" is evident in the manner in which it characterized Pettaway's petition: "The basis for Pettaway's petition is that his reprosecution on the theory that he shot Taylor is barred" by collateral estoppel. *Pettaway*, 943 F.2d at 1043. This statement suggests that the court understood Pettaway's petition to present a single claim: that the prosecution was collaterally estopped from arguing a direct perpetrator theory at retrial. If so, it failed to recognize that Pettaway's petition also presented an additional claim: that the prosecution was collaterally estopped from arguing an either/or theory at retrial.

Moreover, in the very next sentence, the probability of this failure is strengthened. The court said: "To resolve this claim, we must first determine whether the jury's

finding that Pettaway did not personally shoot Taylor has collateral estoppel effect." *Id.* In framing the collateral estoppel issue in this manner, the *Pettaway* court ignored another possibility. The not true finding on the personal weapon use allegation, properly understood, means only that the prosecution failed to prove *beyond a reasonable doubt* that Pettaway personally shot Taylor. The jury, however, might well have believed that it was *more likely than not* that Pettaway did shoot Taylor. All that is known for certain is that the prosecution failed to prove *beyond a reasonable doubt* that Pettaway personally shot Taylor.

The *Pettaway* court's conclusion, to repeat, flows naturally from its erroneous assumption that the only *two* possibilities for sustaining a murder conviction were the direct perpetrator theory and the aider and abettor theory. Under that assumption, Pettaway's murder conviction must rest on the aider and abettor theory. From that it follows that the jury found that "Pettaway did not personally shoot Taylor," inasmuch as an aider and abettor cannot also be a perpetrator. Thus, to repeat, the language the *Pettaway* court used to describe the jury's finding strongly suggests that the *Pettaway* court failed to recognize properly that the either/or theory is a third possibility under California law.

Having both misstated the nature of Pettaway's claim, and misinterpreted the meaning of the jury's not true finding, the next paragraph of the *Pettaway* opinion states:

> Collateral estoppel involves a three-step process: (1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) an examination of the record of the prior case to decide whether the issue was

> "litigated" in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.

Id. at 1043-44 (quoting *United States* v. *Hernandez*, 572 F.2d 218, 220 (9th Cir. 1978)). The court then skipped over step one without any discussion, and proceeded immediately to step two, concluding that "the question whether Pettaway fired the gun himself was actually litigated at the first trial." *Id.* at 1044. By skipping step one, and stating its conclusion with respect to step two in terms of the direct perpetrator theory ("whether Pettaway fired the gun himself"), the court again indicated that the only issue to be decided was whether collateral estoppel precluded the prosecution from relitigating the direct perpetrator theory at retrial. Again the court failed to consider whether the either/or theory had been litigated at the first trial, or whether the prosecution was barred from litigating that theory at the second trial.

The *Pettaway* court, confronted with a conviction for murder and a not true finding on the personal use allegation, harmonized the two by stating: "[T]here is a rational explanation that takes into account the whole of the jury's verdict. . . . [Pettaway] could be guilty of first degree murder as long as he aided and abetted the murderer." *Id.* at 1046. Once more the court failed to consider the possibility that Pettaway could be guilty of murder under an either/or theory.

Nothing in the remainder of the opinion undermines this conclusion. The *Pettaway* court "misunderstood the relevant state law," *Santamaria*, 8 Cal.4th at 923, not in the sense that its holding was contrary to California law, but in the sense that it granted the habeas petition without deciding whether collateral estoppel barred retrial on an

either/or theory. The *Pettaway* court's failure to decide that issue was based on its failure to recognize that, under California law, a defendant can be convicted of murder on an either/or theory, even though "[t]here may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other." *Id.* at 919.

IV.

SCOPE OF COLLATERAL ESTOPPEL

Pettaway should have held that collateral estoppel bars relitigation of a direct perpetrator theory, but does not bar the prosecution from arguing an either/or theory at retrial. Collateral estoppel should not preclude the prosecution from litigating an either/or theory at retrial, because a conviction under that theory would be consistent with the first jury's not true finding on the sentence enhancement charge. Judge Wallace is correct when he points out that "[o]ur opinion in *Pettaway* does not contain a fully persuasive response" to this argument. Majority op. at 4039. *There is no logical inconsistency* between: (1) the first jury's finding that the prosecution failed to prove personal weapon use beyond a reasonable doubt; and (2) a potential finding by a subsequent jury that the prosecution succeeded in proving beyond a reasonable doubt that the defendant was either a direct perpetrator or an aider and abettor.

Judge Wallace points out that *Pettaway* "may have rejected [a] technical, legalistic conception of 'inconsistency.'" Majority op. at 4039. In other words, Pettaway may have decided, as a matter of federal law, that two jury findings could be "inconsistent" for purposes

of collateral estoppel doctrine, even when there was no *logical* inconsistency between them.

Such an interpretation of collateral estoppel is at odds with *Ashe*. There, the Court defined collateral estoppel to mean "that when an issue of ultimate fact has once been determined by a valid and final judgment, *that issue* cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443 (emphasis added). The Court did not say that a *closely related* issue cannot be litigated in a future lawsuit. To bar the litigation of a closely related issue, the resolution of which involves no logical inconsistency with an earlier verdict, would effectively expand the *Ashe* collateral estoppel doctrine. To grant Santamaria's habeas petition would expand *Ashe*, without offering any guidance as to its limits. How "closely related" is "close enough" is an issue not likely to promote certainty in the law.

To repeat, the "not true" finding on the personal knife use charge shows only that the prosecution at the initial trial failed to prove beyond a reasonable doubt that Santamaria personally wielded the murder weapon. There was no finding that the prosecution failed to prove beyond a reasonable doubt that Santamaria was either a direct perpetrator or an aider and abettor. The latter is not the same issue as that resolved by the "not true" finding. Until today, no federal appellate court has interpreted the *Ashe* collateral estoppel doctrine to mean that a jury decision on the first issue bars a subsequent jury from considering the second issue.

V.

CONCLUSION

We should rehear this case en banc to consider whether *Pettaway* should be overruled. But for *Pettaway*, the habeas corpus petition before us should be denied.

- **FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE NAPOLEAN SANTAMARIA,
Plaintiff-Appellee,

v.

DON HORSLEY, Sheriff,
Defendant-Appellant.

No. 95-16991

D.C. No. CV 95-00692 SBA

OPINION

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted En Banc
September 26, 1997--San Francisco, California

Filed January 16, 1998

Before: James R. Browning, J. Clifford Wallace, Harry Pregerson, Alex Kozinski, David R. Thompson, Stephen S. Trott, Ferdinand F. Fernandez, Pamela Ann Rymer, Andrew J. Kleinfeld, Michael Daly Hawkins, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Wallace; Concurrence by Judge Fernandez; Concurrence by Judge Rymer; Concurrence by Judge Kozinski; Dissent by Judge Pregerson

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SUMMARY

CRIMINAL LAW AND PROCEDURE/DOUBLE JEOPARDY

The court of appeals reversed a district court's issuance of a writ of habeas corpus. The court held that, at retrial, the State does not violate the Double Jeopardy Clause by reintroducing evidence of a defendant's weapon use to prove him guilty of murder despite the first jury's "not true" finding of weapon use for sentence enhancement.

A California jury found appellee Jose Santamaria guilty of murder and robbery, but found "not true" a sentence enhancement charge that he used a knife in the commission of a felony. A state appellate court reversed the murder charge, finding that a long continuance during the trial was prejudicial error.

The State presented testimony of Santamaria's accomplice, Anthony Nubla, who testified that Santamaria

stabbed the victim. Santamaria offered an alibi and denied any involvement in the crime.

On remand, Santamaria moved to preclude prosecution's reliance on the theory that he used a knife during the killing. The trial court granted the motions, ruling that the collateral estoppel component of the Double Jeopardy clause barred the prosecution from retrying Santamaria on the theory that he used a knife in the killing. The case was dismissed.

The California Supreme Court reversed the trial court's dismissal, and remanded with instructions to reinstate the charges. Santamaria petitioned for writ of habeas corpus in district court. Issuing the writ, the district court held that the Ninth Circuit's decision in *Pettaway* v. *Plummer* compelled the conclusion that Double Jeopardy barred the state from arguing at retrial that Santamaria used a knife to commit murder.

Pettaway was factually indistinguishable from Santamaria's case. In *Pettaway* the Ninth Circuit held that a jury finding of "not true" on a California sentence enhancement charge implicates the collateral estoppel component of the Double Jeopardy Clause, reasoning that if a defendant's conviction is subsequently reversed on appeal, a "not true" determination bars the prosecution from relying at retrial on any theory of the offense factually inconsistent with it. *Pettaway* held that since the jury convicted Pettaway of murder but rejected the weapons enhancement charge, the jury necessarily decided that Pettaway did not fire the fatal shots, restricting the State to an aiding and abetting theory.

The Ninth Circuit affirmed the district court, holding that *Pettaway* controlled. Appellant Sheriff Don Horsley (State) appealed.

Relying on *Mitchell* v. *Prunty*, Santamaria argued that *Pettaway's* "either/or" theory violated the Sixth Amendment and was logically incoherent.

[1] The sole issue to be addressed was whether the jury's verdict of "not true" on the use of a knife on a weapon enhancement charge precluded the State from presenting evidence and arguing in a retrial that Santamaria used the knife to commit murder.

[2] Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

[3] The California Supreme Court's subsequent clarification of state law has shown that *Pettaway* ascribed too much significance to the jury's "not true" response to the weapon enhancement determination.

[4] There was no dispute that the jury determination on the weapons enhancement issue properly barred the State from seeking the enhancement on retrial. But, this determination did not *necessarily* mean that the jury had therefore found Pettaway guilty of murder only as an aider an abettor. First, an acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Second, California allows a jury to convict for murder without unanimous agreement as to whether the defendant was guilty as an aider and abettor or as a direct perpetrator. California does not require the individual jurors to choose a particular theory of murder beyond a reasonable doubt, so long as each is convinced of guilt.

[5] Santamaria bore the burden of showing that the issue whose relitigation he sought to foreclose was actually

decided in the first proceeding. He had to show that no rational jury could have grounded its verdict on an issue other than the one he sought to foreclose from consideration. [6] Santamaria did not meet his burden. It could not be said that the split verdict indicated that a rational jury could only conclude that Nubla had not only perjured himself but also was the sole active participant in the murder.

[7] Because there was more than one rational conclusion that could be drawn from the first jury's verdict, *Pettaway* erred in restricting the State on retrial to the aiding and abetting theory.

[8] To resolve the issue of whether the State should have been precluded from retrying Santamaria on the theory that he used the knife to kill the victim, while having been allowed retrial on the theories that he aided and abetted, or that he was a direct participant other than using the knife in the murder, it had to be considered whether the use of a knife is an ultimate fact for purposes of a murder conviction under California law.

[9] The State failed to prove beyond a reasonable doubt the ultimate fact that Santamaria used a knife for the weapon enhancement at the first trial. However, to convict him of murder under California law, the State was not required to prove beyond a reasonable doubt that Santamaria used a knife. The use of a knife was not an ultimate fact for the retrial; the State cannot be precluded from presenting evidence that Santamaria stabbed the victim.

[10] *Mitchell* shared *Pettaway*'s flawed premise that if the jury returned a "not true" verdict on a weapon enhancement question but also returned a murder

conviction, it must have concluded that the defendant aided and abetted. To this extent, *Mitchell* was overruled.

[11] *Pettaway* was overruled.

Judge Fernandez concurred, writing that he believed *Pettaway* was essentially sound.

Judge Rymer also concurred, writing that the holding that this application of the collateral estoppel component of double jeopardy was realistic and rational.

Judge Kozinski also concurred, writing while he agreed that *Pettaway* was wrongly decided, be believed it was wrongly decided on different grounds.

Judge Pregerson, joined by Judges Hawkins and Thomas, dissented, writing that *Pettaway* was decided correctly and should not be overturned.

COUNSEL

Joan Killeen, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellant.

Lawrence A. Gibbs, Grossman & Gibbs, Berkeley, California, for the plaintiff-appellee.

OPINION

WALLACE, Circuit Judge:

Sheriff Don Horsley of San Mateo County, California, (State) appeals from the district court's issuance of a writ of habeas corpus in favor of Jose Napolean Santamaria. The district court had jurisdiction under 28 U.S.C. § 2254. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. §§ 1291 and 2253. Because Santamaria argues that retrial will violate his constitutional rights, we may review his petition even though it is pretrial. *See* 28 U.S.C. § 2241(c)(3); *Braden* v. *Judicial Circuit Court of Ky.*, 410 U.S. 484, 488-90 (majority) and 503 (Rehnquist, J., dissenting) (1973). Beyond that, the State has not asked us to abstain or demand further exhaustion on Santamaria's part, nor do we see any other basis for deferring a decision. Therefore, we address the merits of Santamaria's petition. We granted rehearing en banc to determine whether to overrule *Pettaway* v. *Plummer*, 943 F.2d 1041 (9th Cir. 1991) (*Pettaway*). We reverse.

I

In February 1989, a California jury found Santamaria guilty of murder and robbery, but found "not true" a sentence enhancement charge, under California Penal Code § 12022(b), that he personally used a deadly weapon (a knife) in the commission of a felony. *See People* v. *Santamaria*, 8 Cal.4th 903, 909 (1994) (*Santamaria*). A state appellate court reversed the murder conviction, holding that an 11-day continuance during jury deliberations was prejudicial error. *Id.* at 909, citing *People* v. *Santamaria*, 229 Cal.App.3d 269 (1991).

On remand, Santamaria filed a motion to, among other things, "preclude prosecution's reliance on theory adjudicated in defendant's favor at first trial." *Id.* The trial court granted the motion, ruling that the collateral estoppel component of the Double Jeopardy Clause barred the prosecution "from retrying the defendant on

the theory that he personally used the knife during the killing." *Id.* The State subsequently stated that it was unable to proceed in light of the court's ruling, and the case was dismissed. The California Court of Appeal affirmed the trial court's dismissal of the case, but the California Supreme Court reversed. That court held "that collateral estoppel does not apply," *id.* at 922, and remanded the case to the trial court with instructions to reinstate the charges.

Santamaria then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. The district court held that our decision in *Pettaway* compelled the conclusion that the Double Jeopardy Clause bars the State from arguing at retrial that Santamaria used a knife to commit murder. Therefore, the district court issued the writ. The panel of this court affirmed the district court, holding that *Pettaway* controlled the outcome of this case. *Santamaria* v. *Horsley*, 110 F.3d 1352, 1357 (9th Cir. 1997).

The State, Santamaria, and the California Supreme Court agree that this case is factually indistinguishable from *Pettaway*, and that the only substantial legal issue before us is the continuing vitality of that decision. *See Santamaria*, 8 Cal.4th at 923 ("*People* v. *Pettaway* . . . involved virtually the same issue and procedural posture as this case, except that there the weapon enhancement that the jury found not true was for use of a firearm, not a knife.").

We review de novo a district court's decision to issue a writ of habeas corpus. *Martinez-Villareal* v. *Lewis*, 80 F.3d 1301, 1305 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). The habeas corpus provisions of he Antiterrorism and Effective Death Penalty Act of 1996 (amendments to

28 U.S.C. §§ 2241-2255) do not apply retroactively to this appeal. *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2063 (1997).

II

[1] At the outset, we identify what this case is *not* about. Santamaria does not argue that his retrial for murder is barred by the Double Jeopardy Clause of the Fifth Amendment made applicable to the States through the Fourteenth Amendment. Nor does the State argue that it should be permitted to seek the weapon enhancement on retrial. Nor are we concerned with whether collateral estoppel should be limited to subsequent trials, as opposed to retrials; we assume without deciding that the doctrine does apply to retrials. The sole issue we address is whether the jury's verdict of "not true" on the use of a knife on a weapon enhancement charge precludes the State from presenting evidence and arguing in a retrial that Santamaria used the knife to commit murder.

A.

[2] Collateral estoppel, or issue preclusion, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970) (*Ashe*). As the Court has instructed:

> [T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the

> record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury would have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Id. at 444.

In *Ashe*, several bandits robbed six men playing poker. Ashe was tried and acquitted for robbing one of the six men. The State then successfully tried him for another victim. Because the robbery of the second poker player was a separate crime, the Double Jeopardy Clause did not bar the second trial. 397 U.S. at 437-40, 446. However, the Court reversed, holding that the Double Jeopardy Clause contained a collateral estoppel element that barred relitigation of any ultimate fact necessarily decided in an earlier trial. *Id.* at 442-43, 445. Based on an evaluation of the record, the Court held that the only contested issue was identity, and therefore the acquittal in the first trial indicated that the State had failed to prove beyond a reasonable doubt that Ashe was one of the bandits. *Id.* at 445. The State was therefore barred by the doctrine of collateral estoppel from trying Ashe for the robbery of any of the other poker players, since identity would be an ultimate issue in each such trial.

In *Pettaway*, following *Ashe*, we held that a jury finding of "not true" on a California sentence-enhancement charge implicates the collateral estoppel component of the Double Jeopardy Clause. 943 F.2d at 1047-48. We reasoned that if a defendant's conviction is subsequently reversed on appeal, a "not true" determination bars the prosecution from relying at retrial on any theory of the offense factually inconsistent with it. In *Pettaway,* the jury found the defendant guilty of murder,

but found "not true" two sentence enhancement charges that he personally used a firearm and personally inflicted great bodily injury. The murder conviction was reversed on appeal, and at retrial the State proposed to introduce evidence tending to show that Pettaway personally shot the victim. We held that a retrial on that theory would be inconsistent with the first jury's "not true" determinations and would therefore violate the double Jeopardy Clause.

B.

[3] The California Supreme Court's subsequent clarification of state law in *Santamaria* has shown that *Pettaway* ascribed too much significance to the jury's "not true" response on the weapon enhancement determination. We recognize that "[t]he preclusive effect of the jury's verdict . . . is a question of federal law which we must review *de novo*." *Schiro* v. *Farley*, 510 U.S. 222, 232 (1994.) However, *Santamaria* is particularly relevant because it sets forth the state law requirements for proving murder. *See, e.g., Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the state's highest court with respect to state law are binding on the federal courts.").

Pettaway held that since the jury convicted Pettaway of murder but rejected the weapons enhancement charge, "[t]he jury necessarily decided that Pettaway did not fire the fatal shots." 943 F.2d at 1046. Thus, *Pettaway* restricted the State to an aiding and abetting theory. This conclusion is incorrect.

[4] There is no dispute that the jury determination on the weapons enhancement issue properly barred the State from seeking the enhancement on retrial, because the ultimate fact of whether the State had proven the weapon use beyond a reasonable doubt for the enhancement had

been determined already. But this determination did not *necessarily* mean that the jury had therefore found Pettaway guilty of murder only as an aider and abettor. First, we must bear in mind that "an acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt." *United States* v. *Watts*, 117 S.Ct. 633, 637 (1997) (per curiam) (*Watts*), quoting *United States* v. *Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace J., dissenting). Second, California allows a jury to convict a defendant for murder without unanimous agreement as to whether he was guilty as an aider and abettor or as a direct perpetrator. *Santamaria*, 8 Cal.4th at 918; *see generally Schad* v. *Arizona*, 501 U.S. 624, 630-31 (1991) (opinion of Justice Souter, joined by Chief Justice Rehnquist and Justices Kennedy and O'Connor) (upholding Arizona's procedure of allowing a jury to convict a defendant of first-degree murder without agreement as to a particular theory). Thus, California does not require the individual jurors to choose a particular theory of murder beyond a reasonable doubt, "so long as each is convinced of guilt." *Santamaria*, 8 Cal.4th at 919.

Pettaway's two verdicts may be harmonized by concluding that the jury found that Pettaway was guilty as an aider and abettor. However, it is also conceivable that all twelve jurors were convinced beyond a reasonable doubt that Pettaway played some role, either as the shooter or as an aider and abettor, without ascertaining exactly which role. We have no way of knowing, because these alternatives (and perhaps others) are rationally consistent with the jury's verdict in that case.

[5] Santamaria points out that the jury was never instructed that it did not need to reach agreement as to his particular role in the murder, and hence, could not

have relied upon this "either/or" theory. However, he bears the burden of showing "that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling* v. *United States*, 493 U.S. 342, 350 (1990) (*Dowling*). Furthermore, he must convince us that no "rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444, *quoting Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38-39.*

[6] This he did not and cannot do. The State's evidence in this case came largely by way of accomplice Anthony Nubla, who testified that he saw Santamaria hugging the victim's neck and stabbing him. *Santamaria*, 8 Cal.4th at 909. Santamaria, on the other hand, testified that on the day of the murder, he had driven a friend to pick up a paycheck; he denied any involvement in the crime. *People v. Santamaria*, 229 Cal. App. 3d at 274. By convicting him of murder, the jury obviously rejected Santamaria's alibi. The jury could have had doubts about the complete veracity of Nubla's testimony, but the thrust of the evidence was that Santamaria was the active murderer, and there was little, if any, evidence that Santamaria aided and abetted Nubla in the killing. We cannot say that the split verdict, even in the absence of a specific "either/or" instruction, indicates that a rational jury could only conclude that Nubla had not only perjured himself but also was the sole active participant in the murder.

Pettaway also held that the possibility that the second jury could conclude that Pettaway shot the victim himself, thereby reaching a conclusion "directly contrary" to that of the first jury, would be "abhorrent to the principles underlying the Double Jeopardy Clause." 943 F.2d at 1047. This conclusion is erroneous as well. The second

jury, if it convicted Pettaway on retrial based partially (or even solely) on evidence that he shot the victim, would be concluding only that Pettaway committed murder. *See Santamaria*, 8 Cal. 4th at 923 n.10 ("The jury returns a verdict of guilt or innocence of the *charge*, not a verdict on any particular theory.").

[7] Because there is more than one rational conclusion that can be drawn from the first jury's verdict, *Pettaway* erred in restricting the State on retrial solely to the aiding and abetting theory. *See, e.g., Ashe*, 397 U.S. at 444 & n.9 (holding that the question is whether a rational jury could have based its decision on any other conclusion). We therefore hold that the jury's determination on the weapon enhancement issue cannot restrict the State to retrying Santamaria solely on an aiding and abetting theory of murder.

C.

We next address whether the State could be precluded from retrying Santamaria on the theory that he personally used the knife to kill the victim, while allowing retrial on the theories that he aided and abetted the murder, or that he was a direct participant other than using the knife in the murder. *See e.g., Santamaria*, 8 Cal. 4th at 932-33 (Mosk, J., concurring and dissenting).

[8] To resolve this complex issue, we consider whether the use of a knife is an ultimate fact for the purposes of a murder conviction under California law. If it is not, then collateral estoppel will not preclude the government from introducing evidence that Santamaria stabbed the victim, because collateral estoppel does not "exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal

conduct for which a defendant has been acquitted." *Dowling*, 493 U.S. at 348; *see also United States v. Seley*, 957 F.2d 717, 723 (9th Cir. 1992) ("If an act that could have been proved to a lesser degree than that required for conviction is for some reason probative in a subsequent trial, it need not be excluded because of the prior acquittal."); *cf. Watts*, 117 S. Ct. at 637 (allowing the consideration at sentencing of conduct for which a defendant has been acquitted because of the lower burden of proof at sentencing).

In *Dowling*, the defendant was tried for the robbery of a bank where the robber had worn a ski mask and carried a small handgun. The government sought to introduce evidence that, two weeks after the bank robbery, Dowling attempted to rob a woman, while wearing a ski mask and carrying a small handgun. *Dowling*, 493 U.S. at 344. Dowling, however, had been acquitted of this robbery, and he argued that the government should be collaterally estopped from introducing the evidence.

The Court held that "unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case." 493 U.S. at 348. The difference was that in *Ashe*, the first jury's acquittal "could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits." *Id.* In the second trial, the government would still have to prove beyond a reasonable doubt that Ashe was one of the robbers, a determination that would be directly contrary to the verdict in the first trial. *Id.* On the other hand, in *Dowling*, the government did not have to establish beyond a reasonable doubt that Dowling was the person who entered the second victim's home. Thus, collateral estoppel was not applicable "[b]ecause a jury might reasonably conclude that Dowling was the masked man who entered [the second victim's] home, even if it did

not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial." *Id.* at 348-49.

[9] In this case, the State failed to prove beyond a reasonable doubt the ultimate fact that Santamaria used a knife for the weapon enhancement in the first trial. However, to convict him of murder under California law, the State is not required to prove beyond a reasonable doubt that Santamaria used a knife. *Santamaria*, 8 Cal. 4th at 918-19. Therefore, the use of a knife is not an ultimate fact for the retrial, and the State cannot be precluded from presenting evidence that Santamaria stabbed the victim.

There is at least a theoretical possibility that in the second trial all twelve jurors could convict Santamaria based on individual determinations that the State proved beyond a reasonable doubt that he used the knife, resulting in a verdict contrary to that rendered by the first jury. *See Santamaria*, 8 Cal. 4th at 934 (Mosk, J., concurring and dissenting) (arguing that the jury should be instructed "*only* that it could not find that defendant was guilty as a principal as a direct and active perpetrator *solely through his personal use of a knife*"). But even if we should rest our decision upon such a theoretical possibility, such a verdict would be directly contrary to that of the first jury only if no juror would also find Santamaria guilty under either of the other two theories of murder. Because California has chosen to allow murder to be proven without unanimous agreement as to the particular theory, any juror who thought that the State had proven beyond a reasonable doubt that Santamaria used a knife to kill the victim would necessarily also conclude that the State had proven beyond a reasonable doubt that Santamaria had played a culpable role in killing the victim.

D.

Santamaria argues that the "either/or" theory violates the Sixth Amendment and is logically incoherent. Santamaria's Sixth Amendment argument relies on *Mitchell v. Prunty*, 107 F.3d 1337, 1339 n.2 (9th Cir.) ("Special findings, by contrast, are dispositive of the questions put to the jury. Having agreed to the questions, the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's Sixth Amendment rights."), *cert. denied*, 1997 WL 403175 (1997). In *Mitchell*, a California state jury convicted Mitchell of second-degree murder, but found a weapon enhancement to be not true and rendered a special verdict that he did not drive the car that ran over the victim. *Id.* We reviewed the sufficiency of the evidence to support Mitchell's conviction only under an aiding and abetting theory. *Id.* at 1340.

[10] *Mitchell* concerned sufficiency of the evidence, not collateral estoppel. It, however, shared *Pettaway's* flawed premise that if the jury returned a not true verdict on a weapon enhancement question but also returned a murder conviction, it must have concluded that the defendant aided and abetted. For the reasons we have discussed earlier, that premise is inconsistent with the substantive California state law. To the extent *Mitchell* is inconsistent with this opinion, we overrule it.

Finally, Santamaria has not convinced us that the "either/or" theory is logically incoherent. To begin with, the requirements for proving murder are entirely a matter of state law so long as they are not constitutionally infirm, an issue that has been essentially resolved here by *Schad*.

In any event, the fact that the State failed to prove beyond a reasonable doubt in the first trial that

Santamaria used a knife does not therefore mean that the State logically can prove murder *only* by showing that he aided and abetted. The State's burden under the "either/or" theory is to prove beyond a reasonable doubt that Santamaria used the knife or aided and abetted, but it can meet this burden even if it fails to prove beyond a reasonable doubt that he used the knife and it fails to prove beyond a reasonable doubt that he aided and abetted, so long as the jury is convinced beyond a reasonable doubt that he was culpably involved in the killing.

Indeed, the California Supreme Court persuasively points out that the true logical incoherence lies in Santamaria's position. Requiring the State to prove either direct perpetration or aiding and abetting beyond a reasonable doubt could result in acquittal in a situation where the jury is convinced beyond a reasonable doubt that two co-defendants committed a crime, but is not sure beyond a reasonable doubt as to which defendant was the direct perpetrator and which was the aider and abettor. *Santamaria*, 8 Cal. 4th at 920 n.8, *quoting People v. Perez*, 21 Cal. App. 4th 214, 222 (1993).

Moreover, contrary to Santamaria's assertion, the "either/or" theory does not "spell the end for the doctrine of collateral estoppel after a special verdict adverse to the state." As pointed out in *Dowling* and *Seley*, preclusive effect can be given to special verdicts on ultimate facts in subsequent relitigation where the burden of proof remains the same. Thus, had identity been at issue, and had there been a special verdict returned with respect to identity, collateral estoppel might well bar retrial.

[11] In conclusion, we overrule *Pettaway*. We reverse the district court's issuance of the writ of habeas corpus.

REVERSED.

FERNANDEZ, Circuit Judge, Concurring:

I concur in the majority opinion but with a certain degree of discomfort. As an intellectual and analytical matter, I believe that *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991), was essentially sound. It precluded the State from attempting to prove the defendant guilty solely on the theory that he was the direct perpetrator of a shooting offense, when the State said that was all it could possibly prove. *See id.* at 1047. As the State told the court, "it could suggest no person Pettaway might have aided and abetted." *Id.* To a somewhat lesser extent, that is the same position that the State takes here, and that it took when Santamaria was before the California Supreme Court. *See People v. Santamaria*, 8 Cal. 4th 903, 910, 884 P.2d 81, 82, 35 Cal. Rptr. 2d 624, 625 (1994). (*Santamaria I.*) Indeed, as the majority opinion indicates, the State says that this case and *Pettaway* are on all fours.

I also believe that California Supreme Court Justice Mosk's dissent was correct as an analytical matter. *See Santamaria I*, 8 Cal. 4th at 927-35, 884 P.2d at 94-99, 35 Cal. Rptr. 2d at 637-42. Perhaps I should also say that philosophically and theoretically his opinion and *Pettaway* struck the right note.

However, I concur in the majority opinion because, as Justice Mosk pointed out, it is generally true that the correct approach "yields little real benefit to [the] defendant." *Id.* at 933, 884 P.2d at 98, 35 Cal. Rptr. 2d at 641. On reflection, it is clear that under the correct

approach all of the evidence of the killing could come in. The jury would then have to be instructed that it could convict if it determined that the defendant had aided and abetted a murder, or if it was unsure whether he was the direct perpetrator of a murder or was just an aider and abettor. However, the jury would also have to be told that it could *not* convict the defendant on the theory that he was the direct perpetrator.[1] In other words, the jury would have to be told that if it thought that the defendant was the worst participant possible, it could not convict him. To one who likes to solve koans, that might be all right. But to one who cares about having the legal system look as rational as it usually is, it is a dreary prospect. Pity the poor trial judge who would have to so instruct the jury while keeping a straight face!

Thus, it seems to me that we are driven back to the Supreme Court's warning about the use of collateral estoppel in the double jeopardy area, that is, "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S. Ct. 1189, 1194 25 L. Ed. 2d 469 (1970). Analytics, philosophy and theory cannot parry the allonge of realism and rationality, and must fall mortally wounded. *Pettaway* and Justice Mosk's view must fall with them. The Constitution's collateral estoppel emanation cannot be used here.

Thus, I concur.

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1. Again, it is important to recognize that the State in *Pettaway*, and probably here, indicated that the only thing it had any evidence of or could prove was that the defendant was the direct perpetrator.

RYMER, Circuit Judge, concurring:

I concur in Judge Wallace's opinion, but for the additional reason that, at the end of the day, it would be unrealistic and confusing to restrict the jury on retrial by instructing that the jury could not find Santamaria guilty as a principal as a direct and active perpetrator solely through his personal use of a knife. To do so (as Justice Mosk's analysis would require) strikes me as making no practical sense. Therefore, to hold that Santamaria may be retried on the murder charge comports with the Supreme Court's admonition that the collateral estoppel component of double jeopardy be applied with "realism and rationality." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970).

KOZINSKI, Circuit Judge, concurring.

I agree that *Pettaway v. Plummer*, 943 F.2d 1041 (9th cir. 1991), was wrongly decided, but on very different grounds than the majority. As the opinion notes, "Santamaria does not argue that his retrial for murder is barred by the Double Jeopardy Clause. . . . The sole issue we address is whether the jury's verdict . . . precludes the State from presenting evidence and arguing [a theory] in a retrial[.]" Maj. op. 500. Because Santamaria may be retried, the state does not violate his constitutional rights by detaining him for that purpose. Since Santamaria's detention does not violate the Constitution, there is no basis for invoking the power of federal habeas corpus at this time. *See* 28 U.S.C. § 2254(a).

While there is no caselaw directly on point, we have solid authority in the closely analogous context of

interlocutory appeals in federal prosecutions. When a district court denies a defendant's motion to dismiss the indictment based on double jeopardy, the defendant may appeal immediately. *See Abney v. United States*, 431 U.S. 651, 662 (1997). This is because a double jeopardy claim implicates more than a defendant's right not to be twice convicted; it implicates his right not to endure a second trial at all—even one that ends in an acquittal. *See id.* at 661-62. But a defendant who is subject to retrial even if he prevails on his collateral estoppel claim may not bring an interlocutory appeal. Rather, he must stand trial, object to the evidence and then raise the issue on appeal following conviction. *See United States v. Powell*, 632 F.2d 754, 758 (9th Cir. 1980). *Accord United States v. Head*, 697 F.2d 1200, 1205 (4th Cir. 1982); *United States v. Mock*, 604 F.2d 336, 340 (5th Cir. 1979). Such claims are treated precisely like other pretrial claims for suppression of evidence; that they are based on collateral estoppel, rather than, say, a violation of the Fifth Amendment, makes no difference.

This distinction applies with equal, perhaps greater, force to a case like ours where pretrial federal intervention impedes the orderly processes of the state courts. When a petitioner claims he is entitled to avoid retrial altogether, he may seek immediate federal habeas because the retrial itself would cause irreparable constitutional harm. But where he merely disputes what evidence may be admitted during retrial, his constitutional claim does not arise until he suffers a conviction based on the disputed evidence.

Pettaway acknowledged the rule of *Powell*, *Head*, and *Mock*, *see Pettaway*, 943 F.2d at 1046, but concluded that petitioner could bring a pretrial habeas petition anyway because the prosecution had no other evidence on which to base a conviction. *Id.* at 1047. This is not persuasive.

Whether the state will produce other evidence at trial has no bearing on whether petitioner suffers irreparable constitutional harm by going to trial. If, for example, the state court rejects a petitioner's claim that his confession was coerced, he may not bring an immediate habeas petition to forestall introduction of that evidence, even if the prosecution admits it has nothing else. If petitioner is convicted, his constitutional claim can be vindicated by post-conviction habeas relief. It makes no difference that Santamaria's claim of exclusion is based on collateral estoppel rather than more familiar constitutional grounds. *Pettaway* erred in asserting federal jurisdiction before retrial. By deciding Santamaria's claim on the merits, the majority today follows down the same garden path.

The majority disposes of the jurisdictional problem in a terse sentence: "Because Santamaria argues that retrial will violate his constitutional rights, we may review his petition even though it is pretrial. *See* 28 U.S.C. § 2241(c)(3); *Braden v. Judicial Circuit Court of Ky.*, 410 U.S. 484, 488-90 (majority) and 503 (Rehnquist, J., dissenting) (1973)." Maj. op. 498. But the majority elsewhere admits that "Santamaria does not argue that his retrial for murder is barred by the Double Jeopardy Clause[.]" *Id.* at 500. I have a hard time reconciling these two sentences from the majority opinion. Perhaps the majority is saying that federal habeas will lie whenever a state prisoner argues that he will suffer a constitutional deprivation during an upcoming state trial. But a prisoner's prediction that he will suffer constitutional harm during a trial that has not yet taken place has never been a sufficient basis for bringing a pretrial habeas petition; were it otherwise, every prisoner who claims that admission of a confession will violate his right not to incriminate himself would be entitled to immediate review of that claim on federal habeas.

Braden succinctly summarized what was at stake there: "Petitioner does not . . . seek at this time to litigate a federal defense to a criminal charge, but only to demand enforcement of the Commonwealth's affirmative constitutional obligation to bring him promptly to trial." *Id.* at 489-90. The majority in *Braden* held that petitioner's right to a prompt trial could not be vindicated in a post-trial habeas petition because, at that point, the time for a prompt trial would have long passed. *See id.* at 490-91. *Braden*, then, stands for the unremarkable proposition that where a constitutional right would be lost if not raised immediately, it may be raised immediately. This is entirely consistent with the double jeopardy line of cases. More curious than the majority's reliance on *Braden* is its citation to the dissent, as if to suggest that the entire *Braden* Court would endorse assertion of jurisdiction in our case. Since Chief Justice Rehnquist was arguing that even Braden's claim could not be raised pretrial, *see id.* at 507-08, I suspect he will be surprised to find himself drafted as supporting the expansive view of jurisdiction taken by the majority today.

As for *Pettaway*'s substantive analysis, I am less convinced than the majority that it is wrong. For the reasons explained by Judge Pregerson in his dissent, and Justice Mosk in *People v. Santamaria*, 8 Cal. 4th 903, 927 (1994) (Mosk, J., dissenting in part), I have a lot of trouble concluding that the state Supreme Court can so easily finesse the *Ashe* problem. But, as we lack jurisdiction to consider the matter, I decline to resolve it. I would simply overrule *Pettaway* in all respects, leaving the substantive issue to be decided in a future case when it is presented on a full record following retrial and conviction.

PREGERSON, Circuit Judge, dissenting, joined by Judges Hawkins and Thomas.

A state trial jury found Jose Napolean Santamaria guilty of murder and robbery. The same jury then addressed sentencing enhancement based on the state's claim that Santamaria had personally used a knife to commit the murder. After being instructed that the state must prove this claim beyond a reasonable doubt, the jury unanimously responded that the claim was "not true."

The majority seems entirely comfortable with the possibility that a second jury may be asked this same question and come to an entirely different conclusion. A fundamental constitutional doctrine meant to give prosecutive authorities one full, fair opportunity to prove its claims is thus read to give the state a second bite at the apple.

Pettaway v. Plummer, 943 F.2d 1041 (9th Cir. 1991), would preclude the prosecution from arguing at a retrial that Santamaria personally used a knife to commit murder. I submit that *Pettaway* was decided correctly and should not be overturned.

I.

A defendant bears the burden to show that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 U.S. 342, 350 (1990). In making this determination, a court should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue *other than* that which the defendant seeks to foreclose from consideration." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)

(emphasis added) (internal quotations omitted). Moreover, "[t]he inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.* (internal quotations omitted). And the court should bear in mind that the rule of collateral estoppel is "not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.*

The majority opinion "overrules" *Pettaway* and in doing so concludes that the jury's unanimous "not true" finding on the sentence enhancement charge did *not necessarily* mean that it found that Pettaway only aided and abetted another person's gun use. In coming to this conclusion, the majority reasons that the "not true" finding could *also* mean that the jury found, under the "either-or" theory, that Pettaway *either* directly used the gun or aided and abetted the person who did.

The majority's imaginative approach might carry water except that Pettaway's jury was *never* instructed on the "either-or" theory—as was the case with Santamaria's jury. The "either-or" theory permits the prosecution to obtain convictions when it is clear that two or more parties were involved in the commission of a crime, yet, the prosecution does not have evidence to prove, beyond a reasonable doubt, the specific role that each played. *See Santamaria*, 8 Cal. 4th at 919 n.8 ("either-or" theory necessary in case where jury cannot determine specific roles played by two masked participants in a robbery) (citing *People v. Perez*, 21 Cal. App. 4th 212, 222 (1993)).

The dilemma did not exist in *Pettaway*, where the prosecution conceded that "at all times [its] theory of prosecution at [the first trial] and even now [at retrial] would be that [Pettaway] shot and killed Karen Taylor."

Pettaway, 943 F.2d at 1044 (internal quotations omitted).[1] Similarly, in Santamaria's case, the prosecution admitted that it had "no other theory of prosecuting this murder; that is we have no evidence that the defendant was anything but the stabber. . . ." *Santamaria*, 8 Cal. 4th at 929.

In assessing the *Santamaria* case, the majority opinion concludes: "We cannot say that the split verdict, even in the absence of a specific 'either-or' instruction, indicates that a rational jury could *only* conclude that [Anthony Nubla, the prosecution's witness who was involved in the crimes,] had not only perjured himself [when he said that Santamaria was the stabber] but also [that Nubla] was the sole active participant in the murder." Majority Opinion at 504 (emphasis added).[2]

But I suggest that the jury would not necessarily have concluded that Nubla was the sole participant in the crime when it found that the prosecution *failed* to prove that Santamaria used a knife to commit murder.

The jury's "not true" finding does *not necessarily* preclude the possibility that it concluded that Santamaria was a direct perpetrator by strangling the victim or by running him over with Nubla's car when it convicted him of murder. *Santamaria*, 8 Cal. 4th at 934. Thus, the jury's "not true" finding does not necessarily mean that the jury thought that Nubla was the sole direct perpetrator of the crime. It only means that Santamaria was not the stabber.

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1. The prosecution further stated that "it could not proceed on any other theory, because it could suggest no person Pettaway might have aided and abetted." *Id.* at 1047.

2. "Anthony Nubla pled guilty to being an accessory to the murder and agreed to cooperate with the prosecution." *Santamaria*, 8 Cal. 4th at 908-909.

As the above discussion indicates, the juries in both *Pettaway* and *Santamaria* did "necessarily decide" that the defendants in these two cases were aiders and abettors only to the extent that they did not personally use a hand held weapon to commit murder.

II.

The majority further holds that the prosecution may introduce evidence to show that Santamaria used a knife to commit murder because "knife use" is not an ultimate fact required to prove the crime of murder. The majority explains that: "If an act that could have been proved to a lesser degree than that required for conviction is for some reason probative in a subsequent trial, it need not be excluded because of the prior acquittal." Majority Opinion at 505 (citing *United States v. Seley*, 957 F.2d 717, 723 (9th Cir. 1992)). Thus, the majority concludes that because the knife use need not be proved beyond a reasonable doubt to prove murder, the prosecution can relitigate knife use on retrial because it is not an "ultimate fact."

However, as California Supreme Court Justice Stanley Mosk pointed out in his dissent in *Santamaria*, "personal use of a knife *is a necessary fact* for the unlawful-act element of the crime of murder insofar as guilt is predicated on a theory dependent thereon-in this case, on a theory that defendant was a principal as a direct and active perpetrator solely through his personal use of a knife." *Santamaria*, 8 Cal. 4th at 932 (emphasis added).

Moreover, the majority opinion does not apply collateral estoppel with "realism and rationality" when it allows the prosecution to relitigate the issue whether Santamaria personally used a knife to commit murder

based on the ephemeral possibility that the jury on retrial may decide that the defendant is guilty of murder resulting from knife use under the "either-or" theory. Here, the prosecution states unequivocally that the available evidence only supports a theory that the defendant was not an aider and abettor but directly used the knife to commit murder. The prosecution thus admits that it will proceed under the theory that the defendant directly used the knife, and implicitly, will not proceed on the "either-or" theory regarding knife use because the prosecution concedes that it will not seek to prove that Santamaria was an aider or abettor.

While the "either or" theory is an option available under California law for cases where it is unclear which of two or more defendants played a specific role in a crime, this option should not be used as a ploy to deny Santamaria the right to be protected under the double jeopardy clause when realism and rationality dictate that the "either-or" theory is inapplicable to his case.

For the reasons stated above, I respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE NAPOLEAN SANTAMARIA,
Plaintiff-Appellee,

v.

DON HORSLEY, Sheriff,
Defendant-Appellant.

No. 95-16991

D.C. No. CV 95-00692 SBA

ORDER AMENDING SEPARATE
CONCURRENCE AND OPINION

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted En Banc
September 26, 1997--San Francisco, California

Filed January 16, 1998
Amended March 11, 1998

Before: James R. Browning, J. Clifford Wallace, Harry Pregerson, Alex Kozinski, David R. Thompson, Stephen S. Trott, Ferdinand F. Fernandez, Pamela Ann Rymer, Andrew J. Kleinfeld, Michael Daly Hawkins, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Wallace; Concurrence by Judge Fernandez; Concurrence by Judge Rymer; Concurrence by Judge Kozinski; Dissent by Judge Pregerson

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SUMMARY

CRIMINAL LAW AND PROCEDURE/DOUBLE JEOPARDY

The court of appeals reversed a district court's issuance of a writ of habeas corpus. The court held that, at retrial, the State does not violate the Double Jeopardy Clause by reintroducing evidence of a defendant's weapon use to prove him guilty of murder despite the first jury's "not true" finding of weapon use for sentence enhancement.

A California jury found appellee Jose Santamaria guilty of murder and robbery, but found "not true" a sentence enhancement charge that he used a knife in the commission of a felony. A state appellate court reversed the murder charge, finding that a long continuance during the trial was prejudicial error.

The State presented testimony of Santamaria's accomplice, Anthony Nubla, who testified that Santamaria stabbed the victim. Santamaria offered an alibi and denied any involvement in the crime.

On remand, Santamaria moved to preclude prosecution's reliance on the theory that he used a knife during the killing. The trial court granted the motions, ruling that the collateral estoppel component of the Double Jeopardy clause barred the prosecution from retrying Santamaria on the theory that he used a knife in the killing. The case was dismissed.

The California Supreme Court reversed the trial court's dismissal, and remanded with instructions to reinstate the charges. Santamaria petitioned for writ of habeas corpus in district court. Issuing the writ, the district court held that the Ninth Circuit's decision in *Pettaway v. Plummer* compelled the conclusion that Double Jeopardy barred the state from arguing at retrial that Santamaria used a knife to commit murder.

Pettaway was factually indistinguishable from Santamaria's case. In *Pettaway* the Ninth Circuit held that a jury finding of "not true" on a California sentence enhancement charge implicates the collateral estoppel component of the Double Jeopardy Clause, reasoning that if a defendant's conviction is subsequently reversed on appeal, a "not true" determination bars the prosecution from relying at retrial on any theory of the offense factually inconsistent with it. *Pettaway* held that since the jury convicted Pettaway of murder but rejected the weapons enhancement charge, the jury necessarily decided that Pettaway did not fire the fatal shots, restricting the State to an aiding and abetting theory.

The Ninth Circuit affirmed the district court, holding that *Pettaway* controlled. Appellant Sheriff Don Horsley (State) appealed.

Relying on *Mitchell v. Prunty*, Santamaria argued that *Pettaway*'s "either/or" theory violated the Sixth Amendment and was logically incoherent.

[1] The sole issue to be addressed was whether the jury's verdict of "not true" on the use of a knife on a weapon enhancement charge precluded the State from presenting evidence and arguing in a retrial that Santamaria used the knife to commit murder.

[2] Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit.

[3] The California Supreme Court's subsequent clarification of state law has shown that *Pettaway* ascribed too much significance to the jury's "not true" response to the weapon enhancement determination.

[4] There was no dispute that the jury determination on the weapons enhancement issue properly barred the State from seeking the enhancement on retrial. But, this determination did not *necessarily* mean that the jury had therefore found Pettaway guilty of murder only as an aider and abettor. First, an acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Second, California allows a jury to convict for murder without unanimous agreement as to whether the defendant was guilty as an aider and abettor or as a direct perpetrator. California does not require the individual

jurors to choose a particular theory of murder beyond a reasonable doubt, so long as each is convinced of guilty.

[5] Santamaria bore the burden of showing that the issue whose relitigation he sought to foreclose was actually decided in the first proceeding. He had to show that no rational jury could have grounded its verdict on an issue other than the one he sought to foreclose from consideration. [6] Santamaria did not meet his burden. It could not be said that the split verdict indicated that a rational jury could only conclude that Nubla had not only perjured himself but also was the sole active participant in the murder.

[7] Because there was more than one rational conclusion that could be drawn from the first jury's verdict, *Pettaway* erred in restricting the State on retrial to the aiding and abetting theory.

[8] To resolve the issue of whether the State should have been precluded from retrying Santamaria on the theory that he used the knife to kill the victim, while having been allowed retrial on the theories that he aided and abetted, or that he was a direct participant other than using the knife in the murder, it had to be considered whether the use of a knife is an ultimate fact for purposes of a murder conviction under California law.

[9] The State failed to prove beyond a reasonable doubt the ultimate fact that Santamaria used a knife for the weapon enhancement at the first trial. However, to convict him of murder under California law, the State was not required to prove beyond a reasonable doubt that Santamaria used a knife. The use of a knife was not an ultimate fact for the retrial; the State cannot be precluded from presenting evidence that Santamaria stabbed the victim.

[10] *Mitchell* shared *Pettaway*'s flawed premise that if the jury returned a "not true" verdict on a weapon enhancement question but also returned a murder conviction, it must have concluded that the defendant aided and abetted. To this extent, *Mitchell* was overruled.

[11] *Pettaway* was overruled.

Judge Fernandez concurred, writing that he believed *Pettaway* was essentially sound.

Judge Rymer also concurred, writing that the holding that this application of the collateral estoppel component of double jeopardy was realistic and rational.

Judge Kozinski also concurred, writing while he agreed that *Pettaway* was wrongly decided, he believed it was wrongly decided on different grounds.

Judge Pregerson, joined by Judges Hawkins and Thomas, dissented, writing that *Pettaway* was decided correctly and should not be overturned.

COUNSEL

Joan Killeen, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellant.

Lawrence A. Gibbs, Grossman & Gibbs, Berkeley, California, for the plaintiff-appellee.

ORDER

The separate concurrence of Judge Kozinski in this case, filed January 16, 1998, is amended as follows:

At slip op. 512, add footnote 1 to the end of the first full paragraph, after "disputed evidence.", as follows:

> In his petition for rehearing, Santamaria agrees that we lack jurisdiction over pre-trial habeas claims of evidence preclusion. *See* PFR at 7. He argues, however, that we have jurisdiction over his appeal because retrial is barred altogether by collateral estoppel. Santamaria claims that this has been his position all along, presumably relying on the argument in his briefs that knife use is an "ultimate fact." If Santamaria were right that knife use is an ultimate fact, retrial would be barred, but he is mistaken.
>
> To evaluate his claim, we ask whether, if the knife evidence were excluded, Santamaria could nonetheless be convicted of murder. *See Dowling v. United States*, 493 U.S. 342, 347 (1990); *People v. Acevedo*, 508 N.E.2d 665, 670 (N.Y. 1987) (defining an ultimate fact as a fact "essential to conviction in the second trial."). The answer is clearly yes. Even if Santamaria did not use the knife, he could be convicted as an aider and abettor or on the theory that he strangled Guadron or ran him over with a car. *See People v. Santamaria*, 8 Cal.4th 903, 919 n.7, 920 (1994); *compare Ashe v. Swenson*, 397 U.S. 436, 446 (1970) (identity of robber had to be established no matter what the rest of the evidence showed.) Whether the state can

actually win on these other theories is irrelevant to whether retrial is barred.

OPINION

WALLACE, Circuit Judge:

Sheriff Don Horsley of San Mateo County, California, (State) appeals from the district court's issuance of a writ of habeas corpus in favor of Jose Napolean Santamaria. The district court had jurisdiction under 28 U.S.C. § 2254. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. §§ 1291 and 2253. Because Santamaria argues that retrial will violate his constitutional rights, we may review his petition even though it is pretrial. *See* 28 U.S.C. § 2241(c)(3); *Braden v. Judicial Circuit Court of Ky.*, 410 U.S. 484, 488-90 (majority) and 503 (Rehnquist, J., dissenting) (1973). Beyond that, the State has not asked us to abstain or demand further exhaustion on Santamaria's part, nor do we see any other basis for deferring a decision. Therefore, we address the merits of Santamaria's petition. We granted rehearing en banc to determine whether to overrule *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991) (*Pettaway*). We reverse.

I

In February 1989, a California jury found Santamaria guilty of murder and robbery, but found "not true" a sentence enhancement charge, under California Penal Code § 12022(b), that he personally used a deadly weapon (a knife) in the commission of a felony. *See People v. Santamaria*, 8 Cal.4th 903, 909 (1994) (*Santamaria*). A state appellate court reversed the murder conviction, holding that an 11-day continuance during jury deliberations was prejudicial error. *Id.* at 909, *citing People v. Santamaria*, 229 Cal.App.3d 269 (1991).

On remand, Santamaria filed a motion to, among other things, "preclude prosecution's reliance on theory adjudicated in defendant's favor at first trial." *Id.* The trial court granted the motion, ruling that the collateral estoppel component of the Double Jeopardy Clause barred the prosecution "from retrying the defendant on the theory that he personally used the knife during the killing." *Id.* The State subsequently stated that it was unable to proceed in light of the court's ruling, and the case was dismissed. The California Court of Appeal affirmed the trial court's dismissal of the case, but the California Supreme Court reversed. That court held "that collateral estoppel does not apply." *id.* at 922, and remanded the case to the trial court with instructions to reinstate the charges.

Santamaria then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California. The district court held that our decision in *Pettaway* compelled the conclusion that the Double Jeopardy Clause bars the State from arguing at retrial that Santamaria used a knife to commit murder. Therefore, the district court issued the writ. A panel of this court affirmed the district court, holding that *Pettaway* controlled the outcome of this case. *Santamaria v. Horsley*, 110 F.3d 1352, 1357 (9th Cir. 1997).

The State, Santamaria, and the California Supreme Court agree that this case is factually indistinguishable from *Pettaway*, and that the only substantial legal issue before us is the continuing vitality of that decision. *See Santamaria*, 8 Cal. 4th at 923 ("*People v. Pettaway* . . . involved virtually the same issue and procedural posture as this case, except that there the weapon enhancement that the jury found not true was for use of a firearm, not a knife.").

We review de novo a district court's decision to issue a writ of habeas corpus. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). The habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (amendments to 28 U.S.C. §§ 2241-2255) do not apply retroactively to this appeal. *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997).

II

[1] At the outset, we identify what this case is *not* about. Santamaria does not argue that his retrial for murder is barred by the Double Jeopardy Clause of the Fifth Amendment made applicable to the States through the Fourteenth Amendment. Nor does the State argue that it should be permitted to seek the weapon enhancement on retrial. Nor are we concerned with whether collateral estoppel should be limited to subsequent trials, as opposed to retrials; we assume without deciding that the doctrine does apply to retrials. The sole issue we address is whether the jury's verdict of "not true" on the use of a knife on a weapon enhancement charge precludes the State from presenting evidence and arguing in a retrial that Santamaria used the knife to commit murder.

A.

[2] Collateral estoppel, or issue preclusion, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (*Ashe*). As the Court has instructed:

> [T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and

> archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Id. at 444.

In *Ashe*, several bandits robbed six men playing poker. Ashe was tried and acquitted for robbing one of the six men. The State then successfully tried him for robbing another victim. Because the robbery of the second poker player was a separate crime, the Double Jeopardy Clause did not bar the second trial. 397 U.S. at 437-40, 446. However, the Court reversed, holding that the Double Jeopardy Clause contained a collateral estoppel element that barred relitigation of any ultimate fact necessarily decided in an earlier trial. *Id.* at 442-43, 445. Based on an evaluation of the record, the Court held that the only contested issue was identity, and therefore the acquittal in the first trial indicated that the State had failed to prove beyond a reasonable doubt that Ashe was one of the bandits. *Id.* at 445. The State was therefore barred by the doctrine of collateral estoppel from trying Ashe for the robbery of any of the other poker players, since identity would be an ultimate issue in each such trial.

In *Pettaway*, following *Ashe*, we held that a jury finding of "not true" on a California sentence-enhancement charge implicates the collateral estoppel component of the Double Jeopardy Clause. 943 F.2d at

1047-48. We reasoned that if a defendant's conviction is subsequently reversed on appeal, a "not true" determination bars the prosecution from relying at retrial on any theory of the offense factually inconsistent with it. In *Pettaway*, the jury found the defendant guilty of murder, but found "not true" two sentence enhancement charges that he personally used a firearm and personally inflicted great bodily injury. The murder conviction was reversed on appeal, and at retrial the State proposed to introduce evidence tending to show that Pettaway personally shot the victim. We held that a retrial on that theory would be inconsistent with the first jury's "not true" determinations and would therefore violate the Double Jeopardy Clause.

[3] The California Supreme Court's subsequent clarification of state law in *Santamaria* has shown that *Pettaway* ascribed too much significance to the jury's "not true" response on the weapon enhancement determination. We recognize that "[t]he preclusive effect of the jury's verdict . . . is a question of federal law which we must review *de novo*." *Schiro v. Farley*, 510 U.S. 222, 232 (1994). However, *Santamaria* is particularly relevant because it sets forth the state law requirements for proving murder. *See, e.g., Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the state's highest court with respect to state law are binding on the federal courts.")

Pettaway held that since the jury convicted Pettaway of murder but rejected the weapons enhancement charge, "[t]he jury necessarily decided that Pettaway did not fire the fatal shots." 943 F.2d at 1046. Thus, *Pettaway* restricted the State to an aiding and abetting theory. This conclusion is incorrect.

[4] There is no dispute that the jury determination on the weapons enhancement issue properly barred the

State from seeking the enhancement on retrial, because the ultimate fact of whether the State had proven the weapon use beyond a reasonable doubt for the enhancement had been determined already. But this determination did not *necessarily* mean that the jury had therefore found Pettaway guilty of murder only as an aider and abettor. First, we must bear in mind that "an acquittal is not a finding of any fact. An acquittal can only be an acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt." *United States v. Watts*, 117 S. Ct. 633, 637 (1997) (per curiam) (*Watts*), *quoting United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace, J., dissenting). Second, California law allows a jury to convict a defendant for murder without unanimous agreement as to whether he was guilty as an aider and abettor or as a direct perpetrator. *Santamaria*, 8 Cal.4th at 918; *see generally Schad v. Arizona*, 501 U.S. 624, 630-31 (1991) (opinion of Justice Souter, joined by Chief Justice Rehnquist and Justices Kennedy and O'Connor) (upholding Arizona's procedure of allowing a jury to convict a defendant of first-degree murder without agreement as to a particular theory). Thus California does not require the individual jurors to choose a particular theory of murder beyond a reasonable doubt, "so long as each is convinced of guilt." *Santamaria*, 8 Cal. 4th at 919.

Pettaway's two verdicts may be harmonized by concluding that the jury found that Pettaway was guilty as an aider and abettor. However, it is also conceivable that all twelve jurors were convinced beyond a reasonable doubt that Pettaway played some role, either as the shooter or as an aider and abettor, without ascertaining exactly which role. We have no way of knowing, because these alternatives (and perhaps others) are rationally consistent with the jury's verdict in that case.

[5] Santamaria points out that the jury was never instructed that it did not need to reach agreement as to his particular role in the murder, and hence, could not have relied upon this "either/or" theory. However, he bears the burden of showing "that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 U.S. 342, 350 (1990) (*Dowling*). Furthermore, he must convince us that no "rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444, *quoting* Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39.

[6] This he did not and cannot do. The State's evidence in this case came largely by way of accomplice Anthony Nubla, who testified that he saw Santamaria hugging the victim's neck and stabbing him. *Santamaria*, 8 Cal. 4th at 909. Santamaria, on the other hand, testified that on the day of the murder, he had driven a friend to pick up a paycheck; he denied any involvement in the crime. *People v. Santamaria*, 229 Cal. App. 3d at 274. By convincing him of murder, the jury obviously rejected Santamaria's alibi. The jury could have had doubts about the complete veracity of Nubla's testimony, but the thrust of the evidence was that Santamaria was the active murderer, and there was little, if any, evidence that Santamaria aided and abetted Nubla in the killing. We cannot say that the split verdict, even in the absence of a specific "either/or" instruction, indicates that a rational jury could only conclude that Nubla had not only perjured himself but also was the sole active participant in the murder.

Pettaway also held that the possibility that the second jury could conclude that Pettaway shot the victim himself, thereby reaching a conclusion "directly contrary" to that of

the first jury, would be "abhorrent to the principles underlying the Double Jeopardy Clause," 943 F.2d at 1047. This conclusion is erroneous as well. The second jury, if it convicted Pettaway on retrial based partially (or even solely) on evidence that he shot the victim, would be concluding only that Pettaway committed murder. *See Santamaria*, 8 Cal. 4th at 923 n.10 ("The jury returns a verdict of guilt or innocence of the *charge*, not a verdict on any particular theory.").

[7] Because there is more than one rational conclusion that can be drawn from the first jury's verdict, *Pettaway* erred in restricting the State on retrial solely to the aiding and abetting theory. *See, e.g., Ashe*, 397 U.S. at 444 & n.9 (holding that the question is whether a rational jury could have based its decision on any other conclusion). We therefore hold that the jury's determination on the weapon enhancement issue cannot restrict the State to retrying Santamaria solely on an aiding and abetting theory of murder.

C.

We next address whether the State should be precluded from retrying Santamaria on the theory that he personally used the knife to kill the victim, while allowing retrial on the theories that he aided and abetted the murder, or that he was a direct participant other than using the knife in the murder. *See, e.g., Santamaria*, 8 Cal. 4th at 923-33 (Mosk, J., concurring and dissenting).

[8] To resolve this complex issue, we consider whether the use of a knife is an ultimate fact for the purposes of a murder conviction under California law. If it is not, then collateral estoppel will not preclude the government from introducing evidence that Santamaria stabbed the victim, because collateral estoppel does not

"exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Dowling*, 493 U.S. at 348; *see also United States v. Seley*, 957 F.2d 717, 723 (9th Cir. 1992) ("If an act that could have been proved to a lesser degree than that required for conviction is for some reason probative in a subsequent trial, it need not be excluded because of the prior acquittal."); *cf. Watts*, 117 S. Ct. at 637 (allowing the consideration at sentencing of conduct for which a defendant has been acquitted because of the lower burden of proof at sentencing).

In *Dowling*, the defendant was tried for the robbery of a bank where the robber had worn a ski mask and carried a small handgun. The government sought to introduce evidence that, two weeks after the bank robbery, Dowling attempted to rob a woman, while wearing a ski mask and carrying a small handgun. *Dowling*, 493 U.S. at 344. Dowling, however, had been acquitted of this robbery, and he argued that the government should be collaterally estopped from introducing the evidence.

The Court held that "unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case." 493 U.S. at 348. The difference was that in *Ashe*, the first jury's acquittal "could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits." *Id.* In the second trial, the government would still have to prove beyond a reasonable doubt that Ashe was one of the robbers, a determination that would be directly contrary to the verdict in the first trial. *Id.* On the other hand, in *Dowling*, the government did not have to establish beyond a reasonable doubt that Dowling was the person who entered the second victim's home. Thus,

collateral estoppel was not applicable "[b]ecause a jury might reasonably conclude that Dowling was the masked man who entered [the second victim's] home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial." *Id.* at 348-49.

[9] In this case, the State failed to prove beyond a reasonable doubt the ultimate fact that Santamaria used a knife for the weapon enhancement in the first trial. However, to convict him of murder under California law, the State is not required to prove beyond a reasonable doubt that Santamaria used a knife. *Santamaria*, 8 Cal. 4th at 918-19. Therefore, the use of a knife is not an ultimate fact for the retrial, and the State cannot be precluded from presenting evidence that Santamaria stabbed the victim.

There is at least a theoretical possibility that in the second trial all twelve jurors could convict Santamaria based on individual determinations that the State proved beyond a reasonable doubt that he used the knife, resulting in a verdict contrary to that rendered by the first jury. *See Santamaria*, 8 Cal. 4th at 934 (Mosk, J., concurring and dissenting) (arguing that the jury should be instructed "*only* that it could not find that defendant was guilty as a principal as a direct and active perpetrator *solely through his personal use of a knife*"). But even if we should rest our decision upon such a theoretical possibility, such a verdict would be directly contrary to that of the first jury only if no juror would also find Santamaria guilty under either of the other two theories of murder. Because California has chosen to allow murder to be proven without unanimous agreement as to the particular theory, any juror who thought that the State had proven beyond a reasonable doubt that Santamaria used a knife to kill the victim would necessarily also conclude that the

State had proven beyond a reasonable doubt that Santamaria had played a culpable role in killing the victim.

D.

Santamaria argues that the "either/or" theory violates the Sixth Amendment and is logically incoherent. Santamaria's Sixth Amendment argument relies on *Mitchell v. Prunty*, 107 F.3d 1337, 1339 n.2 (9th Cir.) ("Special findings, by contrast, are dispositive of the questions put to the jury. Having agreed to the questions, the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's Sixth Amendment rights."), *cert. denied,* 1997 WL 403175 (1997). In *Mitchell*, a California state jury convicted Mitchell of second-degree murder, but found a weapon enhancement to be not true and rendered a special verdict that he did not drive the car that ran over the victim. *Id.* We reviewed the sufficiency of the evidence to support Mitchell's conviction only under an aiding and abetting theory. *Id.* at 1340.

[10] *Mitchell* concerned sufficiency of the evidence, not collateral estoppel. It, however, shared *Pettaway's* flawed premise that if the jury returned a not true verdict on a weapon enhancement question but also returned a murder conviction, it must have concluded that the defendant aided and abetted. For the reasons we have discussed earlier, that premise is inconsistent with the substantive California state law. To the extent *Mitchell* is inconsistent with this opinion, we overrule it.

Finally, Santamaria has not convinced us that the "either/or" theory is logically incoherent. To begin with, the requirements for proving murder are entirely a matter

of state law so long as they are not constitutionally infirm, an issue that has been essentially resolved here by *Schad*.

In any event, the fact that the State failed to prove beyond a reasonable doubt in the first trial that Santamaria used a knife does not therefore mean that the State logically can prove murder *only* by showing that he aided and abetted. The State's burden under the "either/or" theory is to prove beyond a reasonable doubt that Santamaria used the knife or aided and abetted, but it can meet this burden even if it fails to prove beyond a reasonable doubt that he used the knife and it fails to prove beyond a reasonable doubt that he aided and abetted, so long as the jury is convinced beyond a reasonable doubt that he was culpably involved in the killing.

Indeed, the California Supreme Court persuasively points out that the true logical incoherence lies in Santamaria's position. Requiring the State to prove either direct perpetration or aiding and abetting beyond a reasonable doubt could result in acquittal in a situation where the jury is convinced beyond a reasonable doubt that two co-defendants committed a crime, but is not sure beyond a reasonable doubt as to which defendant was the direct perpetrator and which was the aider and abettor. *Santamaria*, 8 Cal. 4th at 920 n.8, *quoting People v. Perez*, 21 Cal. App. 4th 214, 222 (1993).

Moreover, contrary to Santamaria's assertion, the "either/or" theory does not "spell the end for the doctrine of collateral estoppel after a special verdict adverse to the state." As pointed out in *Dowling* and *Seley*, preclusive effect can be given to special verdicts on ultimate facts in subsequent relitigation where the burden of proof remains the same. Thus, had identity been at issue, and had there

been a special verdict returned with respect to identity, collateral estoppel might well bar retrial.

[11] In conclusion, we overrule *Pettaway*. We reverse the district court's issuance of the writ of habeas corpus.

REVERSED.

FERNANDEZ, Circuit Judge, Concurring:

I concur in the majority opinion but with a certain degree of discomfort. As an intellectual and analytical matter, I believe that *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991), was essentially sound. It precluded the State from attempting to prove the defendant guilty solely on the theory that he was the direct perpetrator of a shooting offense, when the State said that was all it could possibly prove. *See id.* at 1047. As the State told the court, "it could suggest no person Pettaway might have aided and abetted." *Id.* To a somewhat lesser extent, that is the same position that the State takes here, and that it took when Santamaria was before the California Supreme Court. See *People v. Santamaria*, 8 Cal.4th 903, 910, 884 P.2d 81, 82, 35 Cal.Rptr.2d 624, 625 (1994). (*Santamaria I*). Indeed, as the majority opinion indicates, the State says that this case and *Pettaway* are on all fours.

I also believe that California Supreme Court Justice Mosk's dissent was correct as an analytical matter. *See Santamaria I*, 8 Cal.4th at 927-35, 884 P.2d at 94-99, 35 Cal.Rptr.2d at 637-42. Perhaps I should also say that philosophically and theoretically his opinion and *Pettaway* struck the right note.

However, I concur in the majority opinion because, as Justice Mosk pointed out, it is generally true that the correct approach "yields little real benefit to [the] defendant." *Id.* at 933, 884 P.2d at 98, 35 Cal.Rptr.2d at 641. On reflection, it is clear that under the correct approach all of the evidence of the killing could come in. The jury would then have to be instructed that it could convict if it determined that the defendant had aided and abetted a murder, or if it was unsure whether he was the direct perpetrator of a murder or was just an aider and abettor. However, the jury would also have to be told that it could *not* convict the defendant on the theory that he was the direct perpetrator.[1] In other words, the jury would have to be told that if it thought that the defendant was the worst participant possible, it could not convict him. To one who likes to solve koans, that might be all right. but to one who cares about having the legal system look as rational as it usually is, it is a dreary prospect. Pity the poor trial judge who would have to so instruct the jury while keeping a straight face!

Thus, it seems to me that we are driving back to the Supreme Court's warning about the use of collateral estoppel in the double jeopardy area, that is, "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe v. Swenson*, 397 U.S. 436, 444 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970). Analytics, philosophy and theory cannot parry the allonge of realism and rationality, and must fall mortally wounded. *Pettaway* and Justice Mosk's view must fall with them. The Constitution's collateral estoppel emanation cannot be used here.

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1. Again, it is important to recognize that the State in *Pettaway*, and probably here, indicated that the only thing it had any evidence of or could prove was that the defendant was the direct perpetrator.

Thus, I concur.

RYMER, Circuit Judge, concurring:

I concur in Judge's Wallace's opinion, but for the additional reason that, at the end of the day, it would be unrealistic and confusing to restrict the jury on retrial by instructing that the jury could not find Santamaria guilty as a principal as a direct and active perpetrator solely through his personal use of a knife. To do so (as Justice Mosk's analysis would require) strikes me as making no practical sense. Therefore, to hold that Santamaria may be retried on the murder charge comports with the Supreme Court's admonition that the collateral estoppel component of double jeopardy be applied with "realism and rationality." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970).

KOZINSKI, Circuit Judge, concurring.

I agree that *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991), was wrongly decided, but on very different grounds than the majority. As the opinion notes, "Santamaria does not argue that his retrial for murder is barred by the Double Jeopardy Clause. . . . The sole issue we address is whether the jury's verdict . . . precludes the State from presenting evidence and arguing [a theory] in a retrial[.]" Maj. op. 2227. Because Santamaria may be retried, the state does not violate his constitutional rights by detaining him for that purpose. Since Santamaria's detention does not violate the Constitution, there is no basis for invoking the power of federal habeas corpus at this time. *See* 28 U.S.C. § 2254(a).

While there is no caselaw directly on point, we have solid authority in the closely analogous context of interlocutory appeals in federal prosecutions. When a district court denies a defendant's motion to dismiss the indictment based on double jeopardy, the defendant may appeal immediately. *See Abney v. United States*, 431 U.S. 651, 662 (1977). This is because a double jeopardy claim implicates more than a defendant's right not to be twice convicted; it implicates his right not to endure a second trial at all—even one that ends in an acquittal. *See id.* at 661-62. But a defendant who is subject to retrial even if he prevails on his collateral estoppel claim may not bring an interlocutory appeal. Rather, he must stand trial, object to the evidence and then raise the issue on appeal following conviction. *See United States v. Powell*, 632 F.2d 754, 758 (9th Cir. 1980). Accord *United States v. Head*, 697 F.2d 1200, 1205 (4th Cir. 1982); *United States v. Mock*, 604 F.2d 336, 340 (5th Cir. 1979). Such claims are treated precisely like other pretrial claims for suppression of evidence; that they are based on collateral estoppel, rather than, say, a violation of the Fifth Amendment, makes no difference.

This distinction applies with equal, perhaps greater, force to a case like ours where pretrial federal intervention impedes the orderly processes of the state courts. When a petitioner claims he is entitled to avoid retrial altogether, he may seek immediate federal habeas because the retrial itself would cause irreparable constitutional harm. But where he merely disputes what evidence may be admitted during retrial, his constitutional claim does not arise until he suffers a conviction based on the disputed evidence.[2/]

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2. In his petition for rehearing, Santamaria agrees that we lack jurisdiction over pre-trial habeas claims of evidence preclusion. *See* PFR at 7. He argues, however, that we have jurisdiction over his

Pettaway acknowledged the rule of *Powell*, *Head* and *Mock*, see *Pettaway*, 943 F.2d at 1046, but concluded that petitioner could bring a pretrial habeas petition anyway because the prosecution had no other evidence on which to base a conviction. *Id.* at 1047. This is not persuasive. Whether the state will produce other evidence at trial has no bearing on whether petitioner suffers irreparable constitutional harm by going to trial. If, for example, the state court rejects a petitioner's claim that his confession was coerced, he may not bring an immediate habeas petition to forestall introduction of that evidence, even if the prosecution admits it has nothing else. If petitioner is convicted, his constitutional claim can be vindicated by post-conviction habeas relief. It makes no difference that Santamaria's claim of exclusion is based on collateral estoppel rather than more familiar constitutional grounds *Pettaway* erred in asserting federal jurisdiction before retrial. By deciding Santamaria's claim on the merits, the majority today follows down the same garden path.

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appeal because retrial is barred altogether by collateral estoppel. Santamaria claims that this has been his position all along, presumably relying on the argument in his briefs that knife use is an "ultimate fact." If Santamaria were right that knife use is an ultimate fact, retrial would be barred, but he is mistaken.

To evaluate his claim, we ask whether, if the knife evidence were excluded, Santamaria could nonetheless be convicted of murder. *See Dowling v. United States*, 493 U.S. 342, 347 (1990); *People v. Acevedo*, 508 N.E.2d 665, 670 (N.Y. 1987) (defining an ultimate fact as a fact "essential to conviction in the second trial"). The answer is clearly yes. Even if Santamaria did not use the knife, he could be convicted as an aider and abettor or on the theory that he strangled Guadron or ran him over with a car. *See People v. Santamaria*, 8 Cal.4th 903, 919 n. 7, 920 (1994); *compare Ashe v. Swenson*, 397 U.S. 436, 446 (1970) (identify of robber had to be established no matter what the rest of the evidence showed). Whether the state can actually win on these other theories is irrelevant to whether retrial is barred.

The majority disposes of the jurisdictional problem in a terse sentence: "Because Santamaria argues that retrial will violate his constitutional rights, we may review his petition even though it is pretrial. *See* 28 U.S.C. § 2241(c)(3); *Braden v. Judicial Circuit Court of Ky.*, 410 U.S. 484, 488-490 (majority) and 503 (Rehnquist, J., dissenting) (1973)." Maj. op. 2225. But the majority elsewhere admits that "Santamaria does not argue that his retrial for murder is barred by the Double Jeopardy Clause[.]" *Id.* at 2227. I have a hard time reconciling these two sentences from the majority opinion. Perhaps the majority is saying that federal habeas will lie whenever a state prisoner argues that he will suffer a constitutional deprivation during an upcoming state trial. But a prisoner's prediction that he will suffer constitutional harm during a trial that has not yet taken place has never been a sufficient basis for bringing a pretrial habeas petition; were it otherwise, every prisoner who claims that admission of a confession will violate his right not to incriminate himself would be entitled to immediate review of that claim on federal habeas.

Braden succinctly summarized what was at stake there: "Petitioner does not . . . seek at this time to litigate a federal defense to a criminal charge, but only to demand enforcement of the Commonwealth's affirmative constitutional obligation to bring him promptly to trial." *Id.* at 489-90. The majority in *Braden* held that petitioner's right to a prompt trial could not be vindicated in a post-trial habeas petition because, at that point, the time for a prompt trial would have long passed. *See id.* at 490-91. *Braden*, then stands for the unremarkable proposition that where a constitutional right would be lost if not raised immediately, it may be raised immediately. This is entirely consistent with the double jeopardy line of cases. More curious than the majority's reliance on *Braden* is its citation to the dissent, as if to suggest that

the entire *Braden* Court would endorse assertion of jurisdiction in our case. Since Chief Justice Rehnquist was arguing that even Braden's claim could not be raised pretrial, *see id.* at 507-508, I suspect he will be surprised to find himself drafted as supporting the expansive view of jurisdiction taken by the majority today.

As for *Pettaway*'s substantive analysis, I am less convinced than the majority that it is wrong. For the reasons explained by Judge Pregerson in his dissent, and Justice Mosk in *People* v. *Santamaria*, 8 Cal.4th 903, 927 (1994) (Most, J., dissenting in part), I have a lot of trouble concluding that the state Supreme Court can so easily finesse the *Ashe* problem. But, as we lack jurisdiction to consider the matter, I decline to resolve it. I would simply overrule *Pettaway* in all respects, leaving the substantive issue to be decided in a future case when it is presented on a full record following retrial and conviction.

PREGERSON, Circuit Judge, dissenting, joined by Judges Hawkins and Thomas.

A state trial jury found Jose Napolean Santamaria guilty of murder and robbery. The same jury then addressed sentencing enhancement based on the state's claim that Santamaria had personally used a knife to commit the murder. After being instructed that the state must prove this claim beyond a reasonable doubt, the jury unanimously responded that the claim was "not true."

The majority seems entirely comfortable with the possibility that a second jury may be asked this same question and come to an entirely different conclusion. A fundamental constitutional doctrine meant to give prosecutive authorities one full, fair opportunity to prove

its claims is thus read to give the state a second bite at the apple.

Pettaway v. Plummer, 943 F.2d 1041 (9th Cir. 1991), would preclude the prosecution from arguing at a retrial that Santamaria personally used a knife to commit murder. I submit that Pettaway was decided correctly and should not be overturned.

I.

A defendant bears the burden to show that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 U.S. 342, 350 (1990). In making this determination, a court should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue *other than* that which the defendant seeks to foreclose from consideration." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (emphasis added) (internal quotations omitted). Moreover, "[t]he inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.* (internal quotations omitted). And the court should bear in mind that the rule of collateral estoppel is "not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.*

The majority opinion "overrules" *Pettaway* and in doing so concludes that the jury's unanimous "not true" finding on the sentence enhancement charge did *not necessarily* mean that it found that Pettaway only aided and abetted another person's gun use. In coming to this conclusion, the majority reasons that the "not true" finding could *also* mean that the jury found, under the "either-or" theory, that Pettaway *either* directly used the gun *or* aided and abetted the person who did.

The majority's imaginative approach might carry water except that Pettaway's jury was *never* instructed on the "either-or" theory—as was the case with Santamaria's jury. The "either-or" theory permits the prosecution to obtain convictions when it is clear that two or more parties were involved in the commission of a crime, yet,

the prosection does not have evidence to prove, beyond a reasonable doubt, the specific role that each played. *See Santamaria*, 8 Cal.4th at 919 n. 8 ("either-or" theory necessary in case where jury cannot determine specific roles played by two masked participants in a robbery) (citing *People v. Perez*, 21 Cal.App.4th 212, 222 (1993)).

This dilemma did not exist in *Pettaway*, where the prosecution conceded that "at all times [its] theory of prosecution at [the first trial] and even now [at trial] would be that [Pettaway] shot and killed Karen Taylor." *Pettaway*, 943 F.2d at 1044 (internal quotations omitted).[3] Similarly, in Santamaria's case, the prosecution admitted that it had "no other theory of prosecuting this murder; that is we have no evidence that the defendant was anything but the stabber. . . ." *Santamaria*, 8 Cal.4th at 929.

In assessing the *Santamaria* case, the majority opinion concludes: "We cannot say that the split verdict, even in the absence of a specific 'either-or' instruction, indicates that a rational jury could *only* conclude that [Anthony Nubla, the prosecution's witness who was involved in the crimes,] had not only perjured himself [when he said that Santamaria was the stabber] but also [that Nubla] was the sole active participant in the murder." Majority Opinion at 2231 (emphasis added).[4] But I suggest that the jury would not necessarily have concluded that Nubla was the sole participant in the crime when it found that the

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3. The prosecution further stated that "it could not proceed on any other theory, because it could suggest no person Pettaway might have aided and abetted." *Id.* at 1047.

4. Anthony Nubla pled guilty to being an accessory to the murder and agreed to cooperate with the prosecution." *Santamaria*, 8 Cal.4th at 908-909.

prosecution *failed* to prove that Santamaria used a knife to commit murder.

The jury's "not true" finding does *not necessarily* preclude the possibility that it concluded that Santamaria was a direct perpetrator by strangling the victim or by running him over with Nubla's car when it convicted him of murder. *Santamaria*, 8 Cal.4th at 934. Thus, the jury's "not true" finding does not necessarily mean that the jury thought that Nubla was the sole direct perpetrator of the crime. It only means that Santamaria was not the stabber.

As the above discussion indicates, the juries in both *Pettaway* and *Santamaria* did "necessarily decide" that the defendants in these two cases were aiders and abettors only to the extent that they did not personally use a hand held weapon to commit murder.

II.

The majority further holds that the prosecution may introduce evidence to show that Santamaria used a knife to commit murder because "knife use" is not an ultimate fact required to prove the crime of murder. The majority explains that: "If an act that could have been proved to a lesser degree than that required for conviction is for some reason probative in a subsequent trial, it need not be excluded because of the prior acquittal." Majority Opinion at 2232 (citing *United States v. Seley*, 957 F.2d 717, 723 (9th Cir. 1992)). Thus, the majority concludes that because knife use need not be proved beyond a reasonable doubt to prove murder, the prosecution can relitigate knife use on retrial because it is not an "ultimate fact."

However, as California Supreme Court Justice Stanley Mosk pointed out in his dissent in *Santamaria*,

"personal use of a knife *is a necessary fact* for the unlawful-act element of the crime of murder insofar as guilt is predicated on a theory dependent thereon-in this case, on a theory that defendant was a principal as a direct and active perpetrator solely through his personal use of a knife." *Santamaria*, 8 Cal.4th at 932 (emphasis added).

Moreover, the majority opinion does not apply collateral estoppel with "realism and rationality" when it allows the prosecution t relitigate the issue whether Santamaria personally used a knife to commit murder based on the ephemeral possibility that the jury on retrial may decide that the defendant is guilty of murder resulting from knife use under the"either-or" theory. Here, the prosecution states unequivocally that the available evidence only supports a theory that the defendant was not an aider and abettor but directly used the knife to commit murder. The prosecution thus admits that it will proceed under the theory that the defendant directly used the knife, and implicitly, will not proceed on the "either-or" theory regarding knife use because the prosecution concedes that it will not seek to prove that Santamaria was an aider or abettor.

While the "either or" theory is an option available under California law for cases where it is unclear which of two or more defendants played a specific role in a crime, this option should not be used as a ploy to deny Santamaria the right to be protected under the double jeopardy clause when realism and rationality dictate that the "either-or" theory is inapplicable to this case.

For the reasons stated above, I respectfully dissent.